Father(s?) of Rock & Roll:  
Why the *Johnnie Johnson v. Chuck Berry* Songwriting Suit Should Change the Way Copyright Law Determines Joint Authorship

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**ABSTRACT**

“Father(s?) of Rock & Roll” utilizes a unique and historic resource—the previously unseen deposition testimony of Chuck Berry and his piano man Johnnie Johnson—to analyze the problems with how copyright law currently determines joint authorship and to propose a new “Berry-Johnson” joint authorship test. In 2000, Johnson sued Berry, claiming he co-wrote the music to nearly all the significant songs in the Berry canon. Granted access to the case file, I quote and analyze key portions of their deposition testimony, using it as a case study of high-level collaborative creativity and exploring what it can teach us about how best to determine joint authorship under US copyright law.

Johnson v. Berry exposes the faults in the prevailing judicial joint authorship tests, which misplace their focus on whether collaborators: (1) considered themselves authors, (2) contributed independently copyrightable expression, (3) controlled the creative

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work, and (4) contributed expression that has audience appeal. “Father(s?) of Rock & Roll” proposes a new approach, the Berry-Johnson test, centered on the creation of the work itself. This test, at its core, asks: did more than one person intend to create a single work and did they each substantially contribute to its essence? If so, these persons are its joint authors. To guide this determination, the test uses: (1) the relative impact of each contribution on the work, (2) the views each contributor had regarding the substantiality of the others’ contributions, and (3) industry custom.

The Berry-Johnson test thereby better recognizes worthy joint authors while setting a bar high enough that courts will not explode with joint authorship litigation. Courts should adopt the Berry-Johnson test to resolve joint authorship disputes. Better yet, Congress should expressly codify it in the Copyright Act, along with a provision creating a compulsory license for authors’ use of their non-author collaborators’ independently copyrightable contributions, closing a worrisome loophole in the law highlighted by the recent Garcia v. Google case.

In this way, the testimony of Chuck Berry and Johnnie Johnson should change copyright law and improve how we determine joint authorship in future collaborations.

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I. INTRODUCTION

If you tried to give rock & roll another name, you might call it “Chuck Berry.”

- John Lennon
  Vocalist, guitarist, and co-songwriter for the Beatles

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Don’t forget that Johnnie Johnson is alive and well and still playing in St. Louis.

- Ian Stewart
  Boogie piano player, road manager, and founding member of the Rolling Stones

On New Year’s Eve 1952, a band strikes up a song at the Cosmopolitan Club, a small East St. Louis, Illinois, bar and music hall. At first the club’s patrons, vigorously celebrating 1953’s impending arrival, pay no particular mind. Soon, however, they notice that this band has a rowdy new sound, and they go wild for it. The music combines rhythm and blues with an unusual country flair added by the unknown but boisterous guitar player. The band is the Sir John’s Trio, led by Johnnie Johnson on piano and backed by drummer Ebbie Hardy with saxophonist Alvin Bennett. Only, on this important occasion, Bennett couldn’t make the show. Fortunately, Johnson knew a local singer/guitarist whom he hired to fill in that night, a man named Chuck Berry.

Beginning with that final night of 1952, this lineup of Berry, Johnson, and Hardy, later renamed the Chuck Berry Combo, continued to play the Cosmo Club for the next three years. In the
process, they helped sow the seeds of a sonic and cultural revolution, a revolution that flowered when they recorded their music with Chess Records in the late 1950s and early '60s and which continues to reverberate around the world today.

But the Cosmo Club no longer exists. No museum, not even a plaque, can be found to mark the corner of 17th and Bond where it once stood. The place today, in 2015, consists only of grass and rubble.5

Across the Mississippi River, in St. Louis, two large boxes of documents sit tucked away in the corner of a law office. They hold the records from the case of Johnson v. Berry,6 a copyright ownership lawsuit filed in 2000, nearly fifty years after these men at the Cosmo Club in East St. Louis helped launch the American art form known as rock and roll.

The boxes contain, most significantly, Berry’s and Johnson’s sworn deposition testimony, much of which is presently unavailable to the public, concerning whether or not Johnson co-wrote the music they recorded together. This music, including the songs “Roll Over Beethoven,” “School Days,” “Sweet Little Sixteen,” “Back in the U.S.A.,” “Too Much Monkey Business,” and “Rock and Roll Music,” became some of the most influential creative work of the twentieth century, without which the Beatles, Beach Boys, Rolling Stones, and Bob Dylan, as we know them, may never have existed and countless young people the world over might have grown up much, much differently.7

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5. See Kevin Belford, Abdicating Our History: Saving the Palladium and St. Louis’ Cultural History, NEXTSTL (May 25, 2011), http://nextstl.com/2011/05/abdicating-our-history-saving-the-palladium-and-st-louis-cultural-history/. On September 19, 2014, I visited the now-vacant site where the Cosmo Club once stood, located at the intersection of Bond Avenue and South 17th Street, East St. Louis, Illinois 62207. See also GOOGLE MAPS, https://www.google.com/maps (search Bond Ave @ S 17th St, East St. Louis, IL 62207, then click “Street View”; the vacant space on the edge of the northwest corner of the intersection is where the Cosmo Club once stood).

6. Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002). Berry’s company, Isalee Music Co., was also named in the suit. Id.


Berry’s Memphis contemporaries Elvis Presley, Carl Perkins, and Jerry Lee Lewis loved and were influenced by his songs as well, evidenced best by their impromptu performance of “Brown Eyed Handsome Man” at Sun Studios in 1956, part of what famously became known as the “Million Dollar Quartet” session (Johnny Cash joined them later in the day to round out the quartet). Peter Guralnick, LAST TRAIN TO MEMPHIS: THE RISE OF ELVIS PRESLEY 365–66 (1994); ELVIS PRESLEY ET AL., Brown Eyed Handsome Man, ON THE MILLION DOLLAR QUARTET: 50TH ANNIVERSARY SPECIAL EDITION (Sun Recordings 2005) (1956), available at https://www.youtube.com/watch?v=AIl5QC1Uh1M; see also Alan Hanson, From “Memphis” to the “Promised Land” . . . Chuck Berry Songs Recorded by Elvis Presley, ELVIS HIST. BLOG, http://www.elvis-history-blog.com/elvis-chuck-berry-songs.html (last visited Feb. 22, 2015) (“Maybellene’ had impressed Elvis so much back in that formative year [of 1955] that he had immediately put it into his live repertoire, and he continued to be drawn to Chuck Berry’s songwriting.”).

The influence of the Berry canon reaches outside of rock and roll as well. As succinctly put by Daryl McDaniels, leader of early rap group Run DMC, “Chuck Berry’s been rapping before rappers been rap,” following which he broke into a rapped version of “School Day,” backed by a DJ, at a 2012 Rock and Roll Hall of Fame tribute to Berry. Patrick Doyle, Chuck Berry Rocks Cleveland Tribute Concert, ROLLING STONE (Oct. 29, 2012), http://www.rollingstone.com/music/news/chuck-berry-rocks-cleveland-tribute-concert-20121029. Country music legend Merle Haggard, performing Berry’s “Memphis” at the same show, proudly counted himself as “part of the fanbase of the great Chuck Berry.” Id.

Berry’s songs have also deeply affected socio-political culture in America and around the world. Hillary Clinton on the Daily Show in July 2014 relayed that Vaclav Havel, the Czechoslovakian leader and anti-communist dissident, had told her he was inspired by rock artist Lou Reed. The Daily Show: Hillary Clinton Extended Interview (Comedy Central television broadcast July 15, 2014), available at http://thedailyshow.cc.com/extended-interviews/aw9j6p/hillary-clinton-extended-interview. Berry was a defining influence on Reed. See Jem Aswad, Lou Reed, Velvet Underground Co-Founder and Embodiment of New York City, Dead at 71, SPIN (Oct. 27, 2013), http://www.spin.com/articles/lou-reed-dead-at-71/ (“You know, Chuck Berry is still out there playing. No one can play his music like he does. My stuff’s the same way.”); Andrew Barker, Lou Reed Dies at 71, VARIETY (Oct. 27, 2013, 10:34 AM), http://variety.com/2013/music/news/lou-reed-dies-at-71-1200768637/ (observing that “Reed was . . . relatively influenced by Chuck Berry and Arthur Rimbaud”).


On a much smaller but perhaps just as telling level, the Washington-insider tell-all This Town casually recounts Tom Brokaw helping motivate fellow media power-broker Tim Russert’s exercise efforts by promising him a Chuck Berry album if he lost ten pounds. See MARK LEIBOVICH, THIS TOWN 19 (2013).

Additional influences and anecdotes are too myriad to list, woven into the fabric of our times.
History knows these songs only as Chuck Berry’s, and Berry’s alone. But the testimony of Berry and Johnson tells a more complex story. This story, in itself, uncovers an invaluable piece of our shared musical and cultural history. The story also, in what is this Article’s ultimate focus, shines a crucial light on the flawed way in which our legal system determines who gets the credit for, and fortune from, collaborative creative work.

Johnson ultimately lost his case against Berry, receiving no credit or fortune, but only because the court ruled that he brought his claims too late, after the statute of limitations had expired, and not because he didn’t co-write the songs. Whether Johnson did, in fact, co-write these songs is still an open question—one on which the records of the suit cast considerable light. Before the court granted summary judgment to Berry, the two sides, preparing the case to be tried, exchanged information and documents through the discovery process, and they took the depositions of both Berry and Johnson, which fill over six hundred pages of transcript.

8. See Richard Middleton, Songwriter, in Continuum Encyclopedia of Popular Music of the World 202, 204 (John Shepherd ed., 2003) (citing Berry as the preeminent example of the individual singer-songwriter, contrasted with group collaboration typified by Buddy Holly and the Crickets); see also Christgau, supra note 7, at 60 (“Say rather that unless we can somehow recycle the concept of the great artist so that it supports Chuck Berry as well as it does Marcel Proust, we might as well trash it altogether.”). Berry, indeed, is often called the “father of rock ‘n’ roll.” Chuck Berry Biography, BIO, http://www.biography.com/people/chuck-berry-9210488 (last visited Feb. 22, 2015). Interestingly, Johnson filed for and obtained a federal registration for that phrase as his trademark, in advance of the publication of his 1999 biography titled Father of Rock & Roll: The Story of Johnnie “B. Goode” Johnson. See Father of Rock & Roll, Registration No. 2,131,397, available at http://www.uspto.gov; Fitzpatrick, supra note 3. Berry, in response to Johnson’s copyright lawsuit, filed a counterclaim to cancel Johnson’s registration. See Johnson, 228 F. Supp. 2d at 1079. This little twist to the suit inspired the “Father(s)?” title of this Article.

9. The disposition of claims based on statute of limitations grounds is no reflection on the merits of the claims, that is, on whether, if timely brought, Mr. Johnson would have been entitled to relief from [Mr. Berry].” Johnson, 228 F. Supp. 2d at 1078. Regarding the fortune at issue, Johnson ultimately sought $3.1 million in back royalties—i.e., half of the $6.2 million in royalties he claimed Berry had received—as well as the right to receive half of any and all future royalties earned from the songs. First Amended Complaint at 4–5, Johnson, 228 F. Supp. 2d at 1071 (No. 4:00CV1891); Plaintiff’s Trial Brief at 3 n.1, Johnson, 228 F. Supp. 2d at 1071 (No. 4:00CV1891) (noting, however, Johnson’s position that “Mr. Berry has received far in excess of the $6.2 million, but that is all Plaintiff is able to discover, given the amount of time that has passed, and the fact that Defendant has no records of royalties he received”).

10. Suits that fail due to the statute of limitations are generally dismissed at a very early stage, typically because it is clear from the outset whether or not they were brought in a timely fashion. See 2 James Wm. Moore et al., Moore’s Federal Practice § 9.07[1] (3d ed. 1999). But because of Johnson’s legal theory regarding the statute of limitations—that his low mental competence and alcoholism, or Berry’s alleged misrepresentations to him that he was not entitled to royalties, should prevent the statute’s application—his claims for joint authorship, fraud, accounting, and breach of fiduciary duty all survived early dismissal. See Johnson v. Berry, 171 F. Supp. 2d 985, 988–90 (E.D. Mo. 2001). The court wanted the parties to develop a factual record on which to decide the limitations issue. See id. at 990. As the parties did not
Though the depositions addressed the statute of limitations issue, the parties spent the majority of their time on the merits of Johnson’s claim that he co-wrote the songs at issue. Berry testified emphatically that he was the sole songwriter, while Johnson was equally steadfast that his musical contributions consisted of more than simply playing on recordings of the songs—that he helped create the songs themselves. Both men’s more candid moments, however,

know how the court would ultimately rule on the statute of limitations, they also explored the merits of Johnson’s claims via the discovery process. See id.


“Too Pooped to Pop,” a fairly obscure recording by Berry and Johnson, was actually credited to Billy Davis, not Berry. FRED ROTHWELL, LONG DISTANCE INFORMATION: CHUCK BERRY’S RECORDED LEGACY 84–86 (2001). Johnson testified that he thought it was an unreleased song he and Berry had created together, but because “Too Pooped to Pop” definitely was released, and because, after he listened to it during his deposition, Johnson said, “[T]hat wasn’t what we rehearsed at my house. . . . That’s altogether different,” Johnson was likely thinking of another song. Deposition of Johnnie Johnson Volume II at 289:11–291:19, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891) (on file with the author); see ROTHWELL, supra note 11, at 84–86. Asked about the song in his deposition, Berry stated emphatically that “Too Pooped to Pop” is not my song, I didn’t want to record it. I did the best I could with it” and Leonard Chess had us do it because of some situation he had with [Billy Davis].” Deposition of Charles E. Berry Volume II at 279:25–281:5, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891) (on file with the author); see also ROTHWELL, supra note 11, at 86 (suggesting that Chess was trying to woo Davis to join the company as a full-time artists and repertoire (A&R) man and producer). For further information on Davis, see generally NADINE COHODAS, SPINNING BLUES INTO GOLD: THE CHESS BROTHERS AND THE LEGENDARY CHESS RECORDS (2000), detailing Davis’ work at Chess, and Margalit Fox, Billy Davis, Who Developed Iconic TV Ads, Dies at 72, N.Y. TIMES, Sept. 10, 2004, http://www.nytimes.com/2004/09/10/obituaries/10davis.html?_r=0, observing that, early in his career, while co-writing with Berry Gordy, Davis did not know he was supposed to be paid for songwriting, nor did Gordy, who later went on to found Motown Records.

For further detail on how Johnson’s final song list came together, and some potential omissions, see infra note 84 and accompanying text.

12. From the testimony quoted in this Article, readers can determine for themselves whether and how the men’s memory, or sometimes the lack thereof, affected the case. I think
demonstrate how difficult it was to draw the line between sole and joint authorship.

Through their attempts to draw this line, and the compelling uncertainty they experienced when pressed to do so, Berry and Johnson touched on issues that illuminate the nature of songwriting as well as the much larger question of what it means to author, and jointly author, a creative work. Their testimony also casts significant doubt on the propriety of the courts’ existing tests for joint authorship under US copyright law.

Specifically, for purposes of copyright’s joint authorship rules, their testimony demonstrates that neither intent to be considered a work’s author nor the “independent copyrightability” of a contribution to a work should determine joint authorship. Johnson did not understand that his contributions constituted authorship, so he did not regard himself as an author, and a number of his contributions were likely, by themselves, uncopyrightable. But through their significance, as detailed in both men’s depositions, Johnson’s contributions still seek to be recognized as joint authorship.

Berry’s and Johnson’s testimony also makes the case that creative control, or “dominance,” is a poor indicator of sole authorship. Berry, not Johnson, clearly dominated their relationship, but both recognized it was their musical interplay that truly dominated their creative process.

Finally, the testimony exposes the problems with using audience appeal to judge joint authorship. Often, the record producer Leonard Chess buried Johnson’s piano playing in the songs’ mix or eliminated it completely from the final recordings, distorting how an audience would understand the potential significance of Johnson’s input.

Ultimately, the case suggests a new approach to joint authorship: a “Berry-Johnson” test that focuses less on peripheral issues like intent, dominance, and audience appeal, and more on how the work itself was created. The test, at its core, asks: did more than one person intend to create a single work and did they each substantially contribute to its essence? If so, these persons are joint

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13. See Childress v. Taylor, 945 F.2d 500, 506–07 (2d Cir. 1991) (adopting these two requirements for joint authorship).
14. See Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000) (establishing “control” or “dominance” as an essential determiner of joint authorship).
15. See id. (making “audience appeal” another factor in determining whether a contribution rises to the level of joint authorship).
authors. To guide this determination, the test uses the relative impact of the contributions, the views each contributor had on the others’ impact, and industry custom in treating the contribution as or as not joint authorship. Along with the new joint authorship test, Johnson v. Berry also argues for the creation of a compulsory license to give authors unrestricted use of their collaborators’ independently copyrightable contributions, closing a worrisome legal loophole highlighted both here and in the controversial Garcia v. Google case.

To get to this new joint authorship test and proposed license, we will resurrect the music of the Cosmo Club, uncovering the hidden story of two of rock and roll’s creators and reexamining the accepted notion that Chuck Berry was the sole author of his recorded legacy. To begin, Part I sets forth a brief musical and legal framework needed to evaluate the two men’s testimony through the lens of joint authorship before we delve into this testimony in Part III. Part IV examines how this testimony argues against the current joint authorship tests. Lastly, Part V proposes a new Berry-Johnson test for determining joint authorship under US copyright law. This test is inspired by the story of Chuck Berry and Johnnie Johnson’s music, told in their words, and it suggests how we might in the future better apply the law of copyright to creative collaborations such as theirs.

II. SONGWRITING, THE CREATION OF COPYRIGHTABLE EXPRESSION, AND JOINT AUTHORSHIP

A. What Do We Consider Songwriting?

The most common term for creating a song is “songwriting.” We often refer to people like Bob Dylan, Bruce Springsteen, and Joni Mitchell as “songwriters” because, as the word plainly states, they write songs. We also call Lennon/McCartney, Jagger/Richards, Goffin/King, and Leiber/Stoller “songwriting duos.” So the simplest way to cut to the chase is to ask, “Did Johnson help Berry write these songs?” But to answer this, we must first ask what it means to “write” songs. And then, is “write” the best word to describe what we’re actually talking about?

This last question gets at perhaps the root cause of why it took Johnson nearly fifty years to sue Berry. Johnson didn’t think that he wrote songs. As Johnson said in the documentary Hail! Hail! Rock ‘n’

Roll, “No I didn’t write the music with him.” And he was right, in the most literal sense. He never wrote down any words or, for that matter, music. He could play music and create it, but he couldn’t read it or write it down. In fact, Johnson was also correct in a legal sense, whether he knew it or not: under the Copyright Act in effect in the late 1950s and early ’60s, when he and Berry were recording, songs had to be written down and then registered with the US Copyright Office in order to obtain a statutory copyright in them. Today, under the present Copyright Act passed in 1976, songs are automatically copyrighted once they are “fixed in any tangible medium of expression,” which most commonly occurs when they are recorded via audio or video equipment. So copyright’s previous “writing” requirement may well have influenced the term songwriting, but we now understand that term to refer more to the creation of a song, whether or not it is written down.

This tension over what it means to write a song is reflected in musicologist Richard Middleton’s definition of the term “songwriter”:

A songwriter is a person who, alone or in collaboration with others, invents a song and preserves its basic features by writing them down. Although at first glance the definition might seem straightforward, its application depends crucially on an understanding of what constitutes a song and of what counts as writing. These understandings vary. Matters are complicated by the fact that words and music can be produced or used separately, or in different ways. The function of a songwriter may be sharply distinguished from, or alternatively may overlap with, those of other participants in the music-making process. A song can be “written down” on paper, on a recording or on a computer disc—and sometimes on more than one of these, in which case the different versions can be partial or even in conflict.

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17. Fitzpatrick, supra note 3, at 121 (quoting Hail! Hail! Rock ’n’ Roll, supra note 1). Johnson went on to say that he and Berry “would get together and we’d play some kind of music that he could put the lyrics into and it would all come out just right, you know,” indicating that Johnson distinguished between writing music and creating it. Id.


19. See 1 Melville B. Nimmer & David Nimmer, Nimmer On Copyright § 2.05[A] (Rev. ed. 2014) (citing 17 U.S.C. §§ 12 and 13 from the Copyright Act of 1909); 2 id. § 7.16[e][ii]. “Common law copyright” under state law, however, could have attached to these musical compositions prior to federal registration. See id. State law protections, as one might expect, did not have the same scope or reach as those that federal copyright law could provide, so record companies like Chess would, as a business practice, file for federal registration of their artists’ songs. See Deposition of Charles E. Berry Volume I, 158:8–159:13, Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002) (No. 4:00CV1891) (on file with the author); Cohodas, supra note 11, at 79–80 (detailing Chess’ creation of Arc Music to handle the music publishing and copyright registration of its artists’ songs).

20. 17 U.S.C. § 102(a) (2012); see also 1 Nimmer & Nimmer, supra note 19, § 2.05[A] (“[U]nder the present Copyright Act, a musical work is entitled to copyright, as long as it is ‘fixed in any tangible medium of expression,’ regardless of the nature of such medium.”).

21. Middleton, supra note 8, at 202. Perhaps we should phase out the term “songwriting” entirely, given the recognition that creating a song and making an audio recording of a song can constitute “writing” it. Instead, perhaps “song-creating” and “song-creation” are more accurate and encompassing ways to describe the process. Popular music has seen numerous
Despite the inherent uncertainties and complexities of this definition, we can take from it a fairly simple guidepost, musically speaking, for our analysis: was Johnson simply one of the “other participants” in the music-making process—a pianist who played on the recordings and who perhaps also helped arrange some elements of Berry’s songs—or was he more? Did Johnson help Berry create the songs themselves by molding their basic features, such as melody and harmony? If so,

methods of song-creation, particularly in a group setting. Some, like the Who’s Pete Townshend, create a demonstration recording (demo) of a song, on which they sing the lyrics and melody and play one or more instruments, to which the other band members then listen and add their supporting parts and personal styles to the group recording of the song. See Richie Unterberger, Won’t Get Fooled Again: The Who FROM LIFEBITEO TO QUADROPHENIA 59–60 (2011). Others, like Lou Reed, will introduce a song to the rest of the band in a live setting by singing, playing an instrument, or both, See Paul Zollo, Songwriters on Songwriting 692 (2003). Others still, like the Doors or R.E.M., will form a song as a group, in what is often referred to as a “jam session,” where songs, particularly their music, are developed by all of the band members together and credited to them all. See id. at 631–32; Mr. Mojo Risin’: THE STORY OF L.A. WOMAN (Eagle Rock Entertainment 2012).

22. See David Byrne, How Music Works 160 (2012) (citing “the top-line melody” and “the specific harmonies that support it” as a typical song’s most basic features). Musicians and the music industry also recognize “arranging” the music for a song as another possible role in the music-making process. See Rikky Rokshy, Arranging Songs: How to Put the Parts Together 6–19 (2007). An “arrangement” has been defined as “a version of a piece of music with specific reference to the instruments involved, the manner in which they are played, and the order of the sections of the piece.” Tim Wise, Arrangement, in Continuum Encyclopedia of Popular Music, supra note 8, at 630, 630–31. The law, accordingly, has also recognized that under certain circumstances the arrangement of a preexisting musical work can qualify for copyright protection as a derivative form of the underlying work:

[There must be] something of substance added making the piece to some extent a new work with the old song embedded in it but from which the new has developed. It is not merely a stylistic version of the original song where a major artist may take liberties with the lyrics or the tempo, the listener hearing basically the original tune. It is, in short, the addition of such new material as would entitle the creator to a copyright on the new material.


Some observers, without access to the transcripts quoted here but with knowledge of Johnson’s claims, have stated or implied that Johnson’s contributions constituted arrangements of the songs at issue rather than songwriting. See, e.g., Dean Budnick, Jam Bands: THE COMPLETE GUIDE TO PLAYERS, MUSIC & SCENE 176–77 (2003) (“Johnson arranged some of the music, but the nature of his songwriting contributions remains a matter of debate . . . .”); Richard Skelly, Johnnie Johnson: Artist Biography, ALLMUSIC, http://www.allmusic.com/artist/johnnie-johnson-mn0000199728/biography (last visited Feb. 28, 2015) (“Johnson’s rhythmic piano playing was a key element in all of Berry’s hit singles, a good number of which Johnson arranged.”). Berry’s and Johnson’s deposition transcripts, I believe, provide the best resource yet in evaluating whether Johnson helped create the songs themselves, not merely their arrangements, and should cause a reassessment of any previously reached conclusions on the issue. Cf. Byrne, supra note 22, at 160 (giving a musician and songwriter’s definition of a song’s essential copyrightable aspects).
Johnson would seem, at least in the common understanding of the term, to have been a songwriter.

B. What Does Copyright Law Consider Songwriting?

However, even if we determine that, in musical terms, Johnson helped “write” or “create” these songs, the law might not credit him for it. For instance, the Rolling Stones’ Keith Richards, lead guitarist and co-creator of most of the Stones’ original songs, has long maintained that Johnson helped write the songs at issue. In his 2010 autobiography, Richards described Johnson as “Berry’s original piano player and, if Chuck was honest, the cowriter of many Chuck Berry hits.” But absent a contract between musicians specifying who wrote or otherwise owns the songs, which Berry and Johnson did not have, copyright law has the final word on who gets credit as a songwriter.

This is so because copyright regulates creative expression and assigns the resulting financial rewards. Win a copyright suit, and the credit for these songs changes from “Berry” to “Berry/Johnson” and Johnson receives 50 percent of the money earned from them. This, understandably, carries much sway with the public and the history books. So no matter what Richards or others might say, Johnson and his supporters understood that perhaps the only way to convince people that he helped create the songs was to win a copyright lawsuit against Berry.

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23. Richards, supra note 2, at 465.

24. See Deposition of Charles E. Berry Volume I, supra note 19, at 79:10–79:14, 111:9–111:12 (“Q. Did you ever have a conversation with Johnnie Johnson about ownership of the songs that you were recording there? A. No, I don’t think so.”). But see Shyamkrishna Balganesh, Unplanned Coauthorship, 100 Va. L. Rev. 1683, 1748–50 (2014) (noting the Copyright Act does not expressly contemplate that parties can contract around its definition of “joint work” but that agreements between joint authors—or at least those who consider themselves joint authors—can function as an assignment of copyright ownership that results in a jointly owned work even if, by the strict terms of the Act, the work was not actually created jointly).

25. 17 U.S.C. § 201(a) (2012) (“The authors of a joint work are coowners of copyright in the work.”); 1 Nimmer & Nimmer, supra note 19, § 6.08 (citing Cnty. for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498 (D.C. Cir. 1988), aff’d, 490 U.S. 730 (1989)) (“In the absence of agreement to the contrary, all joint authors share equally in the ownership of the joint work. This is true, even where it is clear that their respective contributions to the joint work are not equal.”). Interestingly, regarding the songwriting credit, if Johnson had won his suit against Berry, and Berry or his record distributors refused to change the credit on commercial releases from “Berry” to “Berry/Johnson,” it is not clear that Johnson could have forced the change. Under prevailing US law, Johnson would have likely had to prove he was financially injured as a result of the failure to make the change. See 3 Nimmer & Nimmer, supra note 19, § 8D.03[4] (citing Santryll v. Burrell, 39 U.S.P.Q. 2d 1052, 1055 (S.D.N.Y. 1996)) (discussing the “right of attribution”). Practically speaking, the change may have been made without dispute, in order to avoid one.
So, what does the law consider to be the copyrightable aspects of a song? One court has noted that “a musical composition is made up of rhythm, harmony, and melody” and that the requisite “originality” for purposes of copyright “must be found in one of these.”26 However, most courts have ruled that rhythm and harmony are rarely, if ever, copyrightable standing alone, as judges typically deem them too basic and commonly used to have the requisite creativity and originality for copyright.27 Instead, melody, they largely agree, is the essential copyrightable feature of a song.28 It need not, however, be the song’s entire melody; a number of courts have recognized that short “riffs” of a melodic nature, primarily where they form a “hook” of a song—a distinctive, catchy part of it—are copyrightable.29


27. See id.; 1 NIMMER & NIMMER, supra note 19, § 2.05 (summarizing courts denying protection to rhythm and harmony).

28. Aside from its lyrics of course, if it has them. 1 NIMMER & NIMMER, supra note 19, § 2.05[D] (“Melody is, of course, the usual source of protection for musical compositions.”). That courts have hesitated to find harmony protectable, but a prominent popular musician and songwriter like David Byrne believes it part of a song’s basic makeup, further demonstrates the tension between the law and the art it governs. See BYRNE, supra note 22, at 160; see also Gabriel Jacob Fleet, Note, What’s in a Song? Copyright’s Unfair Treatment of Record Producers and Side Musicians, 61 VAND. L. REV. 1235, 1236–37 (2008) (discussing the traditional judicial “melody and lyrics’ conception of musical works”). Accordingly, commentators have criticized this judicial conception of what constitutes a song, but courts have been reluctant to expand past this view. Compare id., and Olufunmilayo B. Arewa, From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context, 84 N.C. L. REV. 547, 625–26 (2006), with supra notes 26–28 and accompanying text, and infra note 29 and accompanying text. Here, Johnson claimed he helped create the melodies of the songs he and Berry recorded together, so Johnson v. Berry does not squarely address the issue of whether non-melodic contributions can constitute part of a song’s creation. See infra notes 62–63, 85–88 and accompanying text. However, the Berry-Johnson joint authorship test ultimately proposed here does not block non-melodic contributions from joint authorship; to the contrary, it provides a framework for the fact-finder, judge or jury, to determine whether in a given case a non-melodic (e.g., rhythmic or harmonic) contribution constitutes joint authorship of a song by examining whether it substantially contributes to the song’s essence. See infra notes 210–17 and accompanying text.

29. See Newton v. Diamond, 204 F. Supp. 2d 1244, 1254 (C.D. Cal. 2002) (summarizing decisions where courts have found riffs, often serving as song hooks, as copyrightable). In musical terms, a “riff” is defined as:

[A] short repeated melodic fragment, phrase or theme, with a pronounced rhythmic character. Riffs can be played by any combination of instruments and can be spontaneously improvised or pre-composed. A riff may be repeated unchanged or it can be altered to fit the harmonic changes of a song. Riffs are derived from the ubiquitous call-and-response structures found in African and African-influenced music styles. The use of this systematic repetitive device can be traced back to the earliest African-American musics, such as work songs, ring shouts, field hollers, spirituals and early blues.

Chris Washburne & Franco Fabbri, Riff, in CONTINUUM ENCYCLOPEDIA OF POPULAR MUSIC, supra note 8, at 592, 592. And, in a similarly thorough explanation of the term, a “hook” is:
C. How Does Copyright Law Determine Joint Authorship?

How then does copyright law determine when a song, defined by its copyrightable features, was created by more than one person? Copyright law, as applied by the courts, uses the term “joint author” as the name for one of two or more authors of a song or any other creative work. But neither the US Constitution nor the Copyright Act defines “joint author” or even “author.” So the courts, afforded flexibility but not clarity, have been left to define these terms on a case-by-case basis. If a person works by him- or herself, solo, all this person must do to be considered an author is create copyrightable expression. To create this copyrightable expression, one must “fix [an] idea in a tangible medium of expression,” such as putting words on paper or sounds on record, in an original, unique way.

Courts have had a tougher time, though, determining what it means to be a joint author. The starting point is the term “joint work” because the Copyright Act defines that as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”


See, e.g., Reid, 490 U.S. at 753 n.32 (using the term “joint authorship”); Garcia v. Google, Inc., 766 F.3d 929, 933–37 (9th Cir. 2014) (using term “joint author”), en banc reh’g granted, 771 F.3d 647 (9th Cir. 2014).

See U.S. Const. art. I, § 8, cl. 8 (using the term “authors” without definition); 17 U.S.C. § 101 (2012) (terms absent from the definitions section of the present Copyright Act). Nor did the previous Copyright Act of 1909 define the terms, other than to state that “author” shall include an employer in the case of works made for hire.” 17 U.S.C. § 26 (1909), amended by Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541.

The US Supreme Court, for instance, as early as 1884, defined the term “author” as “he to whom anything owes its orig[i]n; originator; maker.” Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884); see also 1 Nimmer & Nimmer, supra note 19, § 1.06.

See, e.g., Garcia, 766 F.3d at 942–43 (citing Reid, 490 U.S. at 737); 1 Nimmer & Nimmer, supra note 19, § 1.06.

Russ VerSteg, Defining “Author” for Purposes of Copyright, 45 Am. U. L. Rev. 1323, 1326–28 (1996); see Garcia, 766 F.3d at 942–43.

17 U.S.C. § 101; see VerSteg, supra note 34, at 1328. The Copyright Act does not define “inseparable” or “interdependent,” but in applying these terms, courts have observed, first,
joint author is, logically, one of the two or more authors who have together created a joint work. While this concept seems straightforward at first, courts and commentators have struggled with how to implement it in real-life scenarios.

In the absence of a unifying decision by the US Supreme Court, two primary approaches have emerged within the federal courts. The first has been referred to as the “Childress” test, invented by the US Court of Appeals for the Second Circuit in the case of Childress v. Taylor. The second has been called the “mastermind” test, created by the Ninth Circuit. The Childress test requires that, in order for a work to qualify as a joint work, each putative author must have:

1. “intended, at the time of [the work’s] creation, to be a co-author and”
2. “made independently copyrightable contributions to the work.”

The Ninth Circuit’s mastermind test, on the other hand, requires a court to evaluate a joint authorship claim using three criteria that examine whether:

1. a person claiming to be a joint author “superintend[ed] the work by exercising control”;
2. the claimed joint authors made “objective manifestations of a shared intent” to be joint authors; and

that “inseparable” essentially means the parts of a joint work have little or no meaning standing alone, such as when two authors combine to create one written text. Clogston v. Am. Acad. of Orthopaedic Surgeons, 40 U.S.P.Q.2D 1125, 1127 (W.D. Tex. 1996) (citing Childress v. Taylor, 945 F.2d 500, 505 (2d Cir. 1991)). Next, “interdependent” means that the parts “have some meaning standing alone but achieve their primary significance because of their combined effect,” such as lyrics and music to a song. Id. (quoting Childress, 945 F.2d at 505).

But see 1 Nimmer & Nimmer, supra note 19, § 6.01 (noting that the Copyright Act’s definition of “joint work” is “improperly designated” and that it actually describes only a subset of joint works, i.e., those that are jointly authored). There are joint works that are not jointly authored, such as where two or more heirs inherit shares of the copyright in a solo work. See id. For purposes of this Article, we can set such works aside and focus on where joint authors have together created a joint work, not inherited part of it or received part of it by transfer.


(3) the work’s “audience appeal” turns on each claimed joint author’s contribution, such that “the share of each in its success cannot be appraised.”

The Ninth Circuit has further observed that an author is usually “the inventive or master mind who creates, or gives effect to the idea” behind the work—hence the name “mastermind” test—and the concept of “control” is often the most important factor in evaluating authorship.

Commentators have criticized each of these tests on numerous levels, but each also has its defenders and the critics have yet to come up with an alternate approach that Congress or the courts have been willing to adopt. Critics generally worry that both of these tests will block many deserving contributors from the rightful credit for, and fruits from, their creative work because: (1) these contributors did not “intend” to be considered joint authors or were not the controlling force behind the work, even though they creatively added to it; or (2) they made significant contributions to the work that, for various reasons, are not independently copyrightable. Defenders fear that without the requirements embodied in these tests, a flood of joint author litigation could result and the very concept of authorship itself could be dismantled, such that every Tom, Dick, and Harry who help edit a research paper or provide lighting on a film set could colorably claim joint authorship of the paper or film. The critics’ concerns are

40.  Lee, 202 F.3d at 1234 (citations omitted) (internal quotation marks omitted).
41.  Id. at 1234 (emphasis added) (citations omitted) (internal quotation marks omitted). The Ninth Circuit believed that its test would reach similar results as the Childress test: “Although the Second and Seventh Circuits do not base their decisions on the word ‘authors’ in the statute, the practical results they reach are consistent with ours.” Id. at 1233–34.
43.  See, e.g., Gaiman v. McFarlane, 360 F.3d 644, 658 (7th Cir. 2004) (noting concern that a too-open joint authorship rule could cause copyright to “explode”); 1 PAUL GOLSTEIN, GOLSTEIN ON COPYRIGHT § 4.2.1.2 (2d ed. 2000); Dane S. Ciolino & Erin A. Donelon, Questioning Strict Liability in Copyright, 54 Rutgers L. Rev. 351, 401–02 (2002); Russ VerSteeg,
valid, so it seems that we need a fresh approach, but one that addresses the status quo supporters’ legitimate apprehensions.

A detailed examination of the testimony in *Johnson v. Berry* casts a unique light on both the faults and merits of the existing tests, pointing the way to a new one. In particular, the testimony presents a compelling argument that Johnson did co-create at least some of the songs at issue, but the chances that he—and, looking forward, others like him—would be able to obtain legal recognition under the current joint authorship tests are slim to none. Accordingly, I believe this case can steer us toward a new approach, one which offers a way to fix the flaws in the existing tests while still attending to the concerns those tests address. Additionally, *Johnson v. Berry*, through its combination of legal and historical significance, may also help bridge the gap between how those in and outside of the legal community understand collaborative creation.44

III. CHUCK BERRY AND JOHNNIE JOHNSON TESTIFY: DID THEY CREATE THE SONGS TOGETHER?

The most significant aspect of *Johnson v. Berry* for the law of joint authorship is the sworn testimony of the two men, as it illustrates a number of important ways in which the present tests are flawed and how they may be improved. To start, both men largely agreed on several foundational points: (1) Johnson played piano on the songs and did so extremely well, (2) Berry played guitar and sang, and (3) the lyrics were created entirely by Berry. Where they diverged, however, provides the case’s focal point: did Berry bring essentially complete songs to Johnson and the rest of the band, or did Johnson ever help mold the clay with which Berry began—either lyrics alone or lyrics combined with partially composed music—into the song? If Johnson did help Berry in this way, what exactly did he contribute:

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44 How is the case legally significant? True, it did not reach the Supreme Court or even a trial court decision on the merits. So, because we do not have to abide by *Johnson v. Berry*’s insights on joint authorship, we are not forced to study them. I argue instead that we should study and learn from *Johnson v. Berry* because the case abounds with issues that pervade collaborative creativity. Further, though there is no straight line between artistic and legal significance, if the law that governs creative works does not align with the process that helped create one of our country’s most influential art forms (or cultural phenomena, if you won’t stoop to deem rock and roll “art”), it should strongly signal to us that something is amiss.
small suggestions, large ideas, melodic components with his piano? Further, did Johnson regard himself as an author of the songs? Did Berry regard Johnson as such?

A. Smoking Guns? Berry’s Lost Demo Tapes and Other Evidence

To take an initial step back, discovery prior to the depositions revealed the possibility of a smoking gun, or guns, that might help definitively answer these questions. Berry described how demonstration (“demo”) tapes were created for at least some of the songs.45 Berry claimed he could not locate these tapes, indicating that they may have been lost in one of the two fires that had previously enveloped his offices. The tapes would have allowed us to hear whether and how Johnson contributed to these songs’ composition and might have led us to that tantalizingly elusive definitive answer to the dispute.46 Additionally, a number of potential corroborating witnesses, like drummer Ebbie Hardy, Willie Dixon (who played bass on many of Berry and Johnson’s recordings), and Leonard and Phil Chess (producers of the recordings and owners of the record company) were no longer living or were simply not deposed in the case.47

On the one hand, having the tapes and this third-party testimony would have better allowed a jury—and now us—to weigh

45. In his Initial Disclosures provided at the start of the discovery process, Berry noted that his “offices were damaged by fire on two occasions in the past” but that he was “searching for tape recordings prepared by him as part of the song writing process.” Initial Disclosures of Defendants at 4–5, Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002) (No. 4:00CV1891). A little over three months later, in response to Johnson’s First Request for Production, Berry replied that “[a]fter a search of his home and office, defendant has been unable to locate any of the tape recordings.” Defendants’ Response to Plaintiff’s First Request for Production of Documents at 3, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891).

46. Perhaps some demo tapes still wait to be found among Berry’s possessions or in an unopened box of Chess archives. But given the existing number of releases and re-releases of the songs and the amount of discovery taken during the case, this seems unlikely, particularly if the tapes had Berry alone on them with the essence of the songs fully worked out. In other words, if the tapes helped Berry and they still existed, he would have had a strong incentive to locate them. From Johnson’s perspective, the inability to find the tapes was likely viewed as suspiciously convenient for Berry. On the other hand, as Andy Dufresne, on trial for double murder, replied when the prosecutor pointed out how convenient it was that the gun he threw in the river was never found: “Since I am innocent of this crime, sir, I find it decidedly inconvenient . . . .” THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994).

47. Leonard Chess died of a heart attack in Chicago in 1969 at the age of fifty-two. COHODAS, supra note 11, at 299. Ebbie Hardy died in St. Louis in the 1980s. FITZPATRICK, supra note 3, at 132. Willie Dixon died in California in 1992 at the age of seventy-six. COHODAS, supra note 11, at 313. Phil Chess lives in Arizona and should turn ninety-four sometime this year. Id. at 6, 314. Phil Chess did, prior to the suit, talk to Johnson’s biographer about Johnson’s contributions. FITZPATRICK, supra note 3, at 92–94. Chess’ intriguing statements, as relayed by Fitzpatrick, certainly do not discredit Johnson’s claims. See id. (“Johnnie was so important to Chuck’s sound . . . . Chuck didn’t want to play with anyone else.”).
the credibility of Berry’s and Johnson’s respective testimony. On the other hand, the juxtaposition of Berry’s and Johnson’s testimony, and only their testimony, provides, in my view a more fascinating and vital exercise, particularly given the ambiguities inherent in the creation of these songs. Other witnesses could have corroborated Berry or Johnson on one fact or another. Fellow musicians and musicologists could have provided—but for whatever reason did not—expert testimony in the case. Various other details could have been presented and debated at trial, including which songs Johnson played on versus other piano players and whether the songs were written in musical keys more suited for the piano than the guitar. And demo tapes could, of course, have revealed much of the songs’ beginnings and evolution. But no third-party witness, expert, or tape could speak

48. See 1 NIMMER & NIMMER, supra note 19, § 6.07(C) for a discussion of the issues of proof involved in a copyright ownership claim.

49. Regarding the “who played on what” issue, see infra note 175. Regarding the songs’ musical key signatures, Keith Richards believes they reveal that the songs were more likely to have been composed on piano than guitar. According to Richards, the songs’ keys are not guitar keys. If you were a guitar player writing songs, you would shift it down a notch or up a notch and make it easy to play guitar. I know Chuck’s music like the back of my hand. . . . [But] when I had to do . . . that movie: E-flat . . . C-sharp? B-flat? Jazz keys, piano keys.” STANLEY BOOTH, KEITH: STANDING IN THE SHADOWS 174 (1995). They were, in Richards’ view, “Johnnie Johnson’s keys.” HAIL! HAIL! ROCK ‘N’ ROLL, supra note 1; see also RICHARDS, supra note 2, at 468. Others, however, have responded that what Richards calls jazz keys, like E-flat and B-flat, would not be unusual for guitar players like Berry, on whom jazz was a significant influence, to compose in. See PECK, supra note 3, at 242; ROTHWELL, supra note 11, at 43.

Berry’s and Johnson’s depositions only briefly touched on the subject and do not seem (at least to one without training in music theory) to shed much further light on it. Johnson essentially agreed with Richards’ observation that the songs were composed in piano keys, which Johnson also referred to as “major keys,” because Johnson, as he claimed, had helped create the songs on the piano. See Deposition of Johnnie Johnson Volume I at 92–93, 177–80, JOHNSON, 228 F. Supp. 2d 1071 (No. 4:00CV1891) (on file with author). Berry denied ever hearing of piano keys before Richards’ comments and simply disagreed with the idea that there are keys which are more difficult to play in on the guitar than on piano. See Deposition of Charles E. Berry Volume I, supra note 19, at 97–101. Berry did, however, point out that a number of the recordings were sped up by Chess prior to their release in such a way that changed the key of the music heard by the listener. See id., at 92–94, 99:24–101:7 (explaining that “Sweet Little Sixteen” was composed and performed in E-flat because “[i]t fits my voice, the extremes and means of the song fit my voice,” but that the recording originally released by Chess, after being sped up, sounds in the key of C). This obviously makes it more difficult for a listener to retrospectively determine, at least from the original recordings, the key in which a given song was originally composed. It may also explain Richards’ surprise when he played with Berry in HAIL! HAIL! ROCK ‘N’ ROLL: “E-flat? I think I know my Chuck Berry shit and suddenly I have to play all of this stuff in these keys.” BOOTH, supra note 49, at 174.

As it stands then, the “piano keys vs. guitar keys” issue is inconclusive at best and further discussion would not add to the copyright focus of this Article. The issue does seem ripe, though, for a forensic musicologist’s exploration and analysis. For an overview of forensic musicology, see Christopher Beam, What’s a Forensic Musicologist? Someone Who Can Tell Whether Michael Jackson Is Really the One Singing in His New Song, SLATE (Nov. 12, 2010), http://www.slate.com/articles/news_and_politics/explainer/2010/11/whats_a_forensic_musicologist.html/.
to the true nature of Berry and Johnson’s unique relationship, revealed here in their testimony, or to the full scope of their spoken and unspoken musical language.

In all likelihood then, the focus for judge and jury would have circled back to the testimony of the parties themselves, whether the claim was brought in 1958 or 2000. And, certainly for us today, Berry’s and Johnson’s testimony represents the most exciting and useful aspect of the case, particularly because nowhere else have these men spoken so directly, much less on the record under oath, about a creative process whose fruits have proved so musically and culturally influential.

B. Johnson Testifies (“I did all my singing with my hands.”)

Berry’s attorneys took Johnson’s deposition first, over two days in June 2002. Johnson was accompanied by his attorneys, Mitch Margo and Scott Orr, as well as by Travis Fitzpatrick (his biographer and the stepson of George Turek, a Houston millionaire and Johnson benefactor who may have helped fund the suit). Finally, Berry himself attended the first day of Johnson’s testimony.


An intriguing figure, Turek played a significant role in the events leading up to the suit. Turek hired Johnson to play at his 1993 wedding after listening to Johnson’s solo album Johnnie B. Bad. See FITZPATRICK, supra note 3, at 319–22. Turek ended up liking Johnson so much that he became a close confidant and supporter. In particular, after he saw the part of Hail! Hail! Rock ‘n’ Roll where Keith Richards remarked that Johnson helped Berry write the songs at issue, Turek championed a successful campaign to get Johnson elected to the Rock and Roll Hall of Fame. Id. at 330–31; Johnnie Johnson Biography, ROCK & ROLL HALL OF FAME & MUSEUM, http://rockhall.com/inductees/johnnie-johnson/bio/ (last visited Feb. 22, 2015). Turek also came to believe that Berry had not treated Johnson fairly with respect to the songs. See FITZPATRICK, supra note 3, at 335, 355 (“We all agreed that Johnnie had been cheated out of his place in history . . . . I could barely stand to look at [Berry] for what he did to Johnnie.”). So whether or not Turek was a direct source of funding, he certainly helped inspire Johnson’s eventual suit against Berry. See Affidavit of Johnnie Johnson at 1–3, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891); FITZPATRICK, supra note 3, at 330–31, 337–43; PEGG, supra note 3, at 243–46, 250. Johnson, in his biography, referred to Turek as “an angel. That’s the best way to put it. He’s my guardian angel.” FITZPATRICK, supra note 3, at 311.

1. The Statute of Limitations

Before addressing the merits of Johnson’s claims, Berry’s attorney Joe Jacobson began by questioning Johnson on the legal theory Johnson’s side had put forth for why the statute of limitations should not apply: namely, that (a) Johnson was unable to understand the basis for his claims any earlier due to his low IQ and alcoholism, and (b) Berry deceived him into thinking he was not entitled to ownership of the songs. If Johnson did not testify consistently with this theory, the Copyright Act’s three-year statute of limitations would almost certainly bar his joint authorship claim.

53. See id. at 15–120; see also Johnson, 228 F. Supp. 2d at 1073–75.

54. See 17 U.S.C. § 507(b) (2012) (“No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.”). A joint authorship claim is a species of a claim for copyright co-ownership, which accrues once circumstances indicate that the other purported author(s) have repudiated the plaintiff’s claim to joint authorship. See Gaiman v. McFarlane, 360 F.3d 644, 653 (7th Cir. 2004); Johnson, 228 F. Supp. 2d at 1072–73. Here, Johnson admitted he was always aware, from the record labels and radio play, that Berry was given the sole credit for writing the songs. See Johnson, 228 F. Supp. 2d at 1073. So, unless Johnson could establish a legally recognized excuse for failing to sue within three years from when the records were released—from which time he knew or should have known that Berry was asserting sole authorship—the statute of limitations would bar his joint authorship claim. See Johnson v. Berry, 171 F. Supp. 2d 985, 989 (E.D. Mo. 2001) (reciting the legally recognized excuses of “insanity or infancy, absence of the defendant from the jurisdiction, [and] fraudulent concealment” (quoting S. REP. NO. 85-1014 (1957), reprinted in 1957 U.S.C.C.A.N. 1961, 1963)).

Interestingly, the courts’ application of the same statute of limitations, Section 507(b), has been much kinder to long-delayed claims for copyright infringement. For instance, in the case of Petrella v. Metro-Goldwyn-Mayer, Inc., the US Supreme Court recognized that neither Section 507 nor the equitable doctrine of laches barred a suit filed in 2009 by the daughter of the author of a screenplay written in 1963 on which the film Raging Bull was allegedly based. (Only the laches issue was actually in dispute before the Court.) Because of the court-made “separate-accrual rule” for infringement, which holds that Section 507(b)’s three-year limitations period accrues separately for each separate infringing act, the daughter’s claims stemming from MGM’s allegedly infringing acts that occurred within three years prior to the date she filed suit, January 6, 2009, could go forward. The claims could proceed despite the fact that the daughter was aware of her potential claims since at least 1991, when she filed to renew the copyright registration in the 1963 screenplay, and perhaps as early as 1980, when Raging Bull was first released. See Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1969–78 (2014).

While justifications certainly exist for treating copyright infringement claims differently than claims for co-ownership—e.g., once an alleged copyright co-owner asserts that he is the sole owner, any other purported co-owner’s claim begins to accrue, whereas an alleged infringer can infringe in different ways and degrees over the years—there is still some dissonance in the disparate treatment accorded the two types of claims under the same statute of limitations. This is particularly true in light of Petrella’s rejection of the argument that evidentiary issues, such as the 1981 death of the screenplay’s author, would hamper an effective defense against his daughter’s claims. See id. at 1976–77. In other words, as a matter of policy, if evidentiary issues did not prevent Paula Petrella’s copyright claims from going forward forty-six years after the creation of her deceased father’s screenplay, did they really justify barring Johnson from asserting his copyright claims forty-four years after the creation of “Roll Over Beethoven”?

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Interestingly, the courts’ application of the same statute of limitations, Section 507(b), has been much kinder to long-delayed claims for copyright infringement. For instance, in the case of Petrella v. Metro-Goldwyn-Mayer, Inc., the US Supreme Court recognized that neither Section 507 nor the equitable doctrine of laches barred a suit filed in 2009 by the daughter of the author of a screenplay written in 1963 on which the film Raging Bull was allegedly based. (Only the laches issue was actually in dispute before the Court.) Because of the court-made “separate-accrual rule” for infringement, which holds that Section 507(b)’s three-year limitations period accrues separately for each separate infringing act, the daughter’s claims stemming from MGM’s allegedly infringing acts that occurred within three years prior to the date she filed suit, January 6, 2009, could go forward. The claims could proceed despite the fact that the daughter was aware of her potential claims since at least 1991, when she filed to renew the copyright registration in the 1963 screenplay, and perhaps as early as 1980, when Raging Bull was first released. See Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1969–78 (2014).

While justifications certainly exist for treating copyright infringement claims differently than claims for co-ownership—e.g., once an alleged copyright co-owner asserts that he is the sole owner, any other purported co-owner’s claim begins to accrue, whereas an alleged infringer can infringe in different ways and degrees over the years—there is still some dissonance in the disparate treatment accorded the two types of claims under the same statute of limitations. This is particularly true in light of Petrella’s rejection of the argument that evidentiary issues, such as the 1981 death of the screenplay’s author, would hamper an effective defense against his daughter’s claims. See id. at 1976–77. In other words, as a matter of policy, if evidentiary issues did not prevent Paula Petrella’s copyright claims from going forward forty-six years after the creation of her deceased father’s screenplay, did they really justify barring Johnson from asserting his copyright claims forty-four years after the creation of “Roll Over Beethoven”?
Johnson thus had significant incentive to testify that his low IQ and drinking did incapacitate him or, more powerfully, that Berry told him that his contributions did not constitute songwriting. But Johnson did not so testify. As relayed in the court’s eventual ruling, Johnson stated that he continued to play music professionally, handled his own finances, and essentially lived his life aware of and connected to the world. Further, Johnson identified only one statement by Berry that, looking back, he believed was false: after their first recording session, Johnson claimed Berry told him and their drummer Ebbie Hardy that the two of them were not entitled to royalties on the songs.

Based on this testimony, the court eventually held that (a) Johnson was mentally capable of bringing his suit before the statute of

Also noteworthy is that in the United Kingdom—where so many other great rock and roll songs have been created, almost all of them influenced in some way by Berry and Johnson’s recordings—the law does not impose a strict time limit on copyright claims. Thus, in 2005, Matthew Fisher, former keyboardist for the rock group Procol Harum, sued for joint authorship of the 1967 classic “A Whiter Shade of Pale.” Fisher v. Brooker, [2009] UKHL 41 (appeal taken from Eng.); Fisher v. Brooker, [2006] EWHC (Ch) 3239 (Eng.); Liston, supra note 38, at 906–13. Based on his creation of the song’s distinctive organ melody, Fisher won a 40 percent share in the copyright with respect to all future royalties, despite his long delay in filing suit. See Liston, supra note 38, at 892. He received a 40 percent share because UK courts can award a percentage of ownership in line with what they judge to be the magnitude of the joint author’s contribution to the work. See Fisher, [2009] UKHL 41. A number of commentators have argued that US copyright law should similarly allow for such sliding-scale ownership allocation in joint authorship litigation, as opposed to the mandatorily equal shares the law currently assigns to joint authors who have no contrary agreement. See, e.g., Gregory N. Mandel, Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law, 44 U.C. DAVIS L. REV. 283, 352–57 (2010); Benjamin E. Jaffe, Comment, Rebutting the Equality Principle: Adapting the Co-Tenancy Law Model to Enhance the Remedies Available to Joint Copyright Owners, 32 CARDOZO L. REV. 1549, 1571–79; Susan Keller, Comment, Collaboration in Theater: Problems and Copyright Solutions, 33 UCLA L. REV. 891, 933–37 (1986); see also supra notes 24–25 and accompanying text. Overall, the result in the UK’s Fisher case, in my view, more closely mirrors the US Supreme Court’s handling of Petrella’s delayed copyright infringement claim than the district court’s treatment of Johnson’s delayed joint authorship claim.

55. “The broad range of his deposition testimony indicates that Mr. Johnson has been married several times, has seven children, has bought and driven cars, rented various apartments, read the newspaper regularly, worked a number of jobs, led his own band, engaged agents to represent him, managed his own finances, and, in connection with music, traveled fairly extensively.” Johnson, 228 F. Supp. 2d at 1074. Johnson’s testimony on these issues overrode, in the court’s view, an expert witness report submitted on behalf of Johnson by a psychologist named Claude Munday. Munday determined after testing Johnson over two days in January 2001 that he was of “borderline defective intelligence overall . . . consistent with his story of essentially coming to believe that he was entitled to be paid for the time he spent playing music and nothing more, and his failure to then significantly question that belief for years.” Statement of Disputed Material Facts Filed with Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment, Exhibit A at 16, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891).

limitations expired and (b) Berry’s alleged statement did not constitute a factual misrepresentation about the nature of Johnson’s contributions sufficient to justify an exception to the statute of limitations. In other words, in the court’s eyes Johnson was competent enough to have brought his suit earlier, and Berry’s alleged statement about royalties was not equivalent to telling Johnson that he did not help create the songs, it was merely Berry’s opinion concerning their respective legal rights.

As a matter of history, I believe that Johnson’s frank testimony on these issues—which sunk any chance he had of avoiding the statute of limitations—enhances the credibility of his testimony

57. See Johnson, 228 F. Supp. 2d at 1075–76.
58. See id. In the words of the court:

Mr. Berry’s alleged statement about the parties’ relative entitlements is a conclusion of law upon which Mr. Johnson could not reasonably rely. The assertion of one in an adverse position concerning the comparative rights of the two parties cannot support equitable tolling. This single conclusory assertion made 45 years ago as to Johnson’s and Berry’s comparative legal rights, even if dishonest and dishonorable, is patently insufficient to constitute the kind of active factual deception which might support equitable tolling. The alleged statement is one of legal opinion, is not shown to be knowingly false, is not “extraordinary,” and cannot be attributed with preventing Mr. Johnson from asserting his claims for 45 years thereafter.

Id. at 1076 (citations omitted). The court may have sliced this a bit too thin. While entitlement to royalties is certainly a legal issue, it is not so clear where the “legal” versus “factual” line in Berry’s alleged statement is to be drawn. If Berry told Johnson that he was not entitled to royalties because he did not help create the songs—a question that could have been explored at trial—it would arguably be for the jury to decide if Johnson did in fact help create the songs and whether Berry believed this but made the statement to Johnson anyway. Contrast this with a situation where, hypothetically, Berry said, “I know you helped create the songs, but you’re not entitled to any royalties for it,” which would much more clearly be just a “legal opinion.” However, the court went on to say that, regardless of Berry’s alleged statement, it would still have found that the statute of limitations barred Johnson’s claims in light of his subsequent failure to sue within three years of a 1986 conversation he had with Keith Richards in which Richards told him that he should have gotten credit and royalties for the songs at issue. See id.; Richards, supra note 2, at 467–68; infra note 77 and accompanying text.

In fairness, the judge, likely motivated at least in part to encourage settlement prior to having to decide the case on grounds other than its merits, did order the parties to conduct a mediation, though it ultimately failed to produce a settlement. See Order Referring Case to Alternative Dispute Resolution, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891); Alternative Dispute Resolution Compliance Report, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891). A forthcoming documentary on Johnson will apparently contain footage of Johnson’s attorney Mitch Margo claiming that Berry admitted at this mediation that Johnson co-wrote a number of the songs at issue. JOHNNIE BE GOOD: THE MOVIE, http://www.johnniebegoodthemovie.com/TheFilm.lasso (last visited May 5, 2015) (“In the documentary, Johnson’s lawyer insists that during mediation, Chuck Berry admitted that Johnson co-wrote many of the songs.”). While this information is certainly intriguing and provocative, it should be noted that because court-ordered mediation is an off-the-record proceeding typically attended solely by the parties, their representatives, and the mediator, no transcript exists of any statements made by Berry or Johnson at mediation, which makes the deposition video and transcripts quoted here the definitive record of their respective positions regarding the songs’ creation. See E.D. MO. LOCAL R. §§ 6.01–6.04.
regarding his contributions to the songs. But whether or not, after also considering Berry’s testimony about the songs’ creation, we believe one man more than the other, we can surely learn from both of their perspectives.

2. The Go-Light: Creation at Home and on the Road

After wading through the statute of limitations questions, Johnson had the first opportunity, on the record and in the presence of Berry, to describe how the songs were created. Berry’s attorney transitioned to the heart of the matter:

Q. I’d like to talk now about what you did in writing these songs or composing these songs. Let’s move on to that topic now, if we can.

. . . .

A. [Johnson]: I have an idea, and by it not being on paper, I would have to play it on the piano, and Chuck would listen and he would say, “Oh, I like that,” you know, or, “What was that you just played? Play it again,” and I would play it over again, and he would say, “I would like this,” and we would put that into the song that we were working on, to the lyrics that he would have, and bingo, we get a song.

Q. (By Mr. Jacobson) Now, when Chuck would come to you with a new song idea, what did he have with him?

A. Well, he would have something besides the lyrics, he might have little music he was playing with what he had, but when we got together, we put our ideas together, and this is how we come out with a complete song. He would check my idea and see how I worked with it or what he originally had, and if mine was better, that’s what we would use, and that’s how we made our songs up; I mean, that’s how we put our music to the songs.

Q. Now, he had the lyrics written out in advance?

59. I do not mean that Johnson should be commended for telling the truth under oath. We should expect that as a fundamental aspect of our legal system, although experience has too often shown just how uncommon it is. But I do believe that Johnson’s apparent honesty, against his self-interest, on the statute of limitations issues should at least cause us now to take seriously his testimony regarding his musical contributions.

Moreover, Johnson’s memory about events taking place forty-plus years earlier is often surprisingly clear, particularly where he is discussing the music itself. A great anecdote about Johnson’s memory is recounted elsewhere by Etta James, the legendary blues singer, who once sang background with a vocal group (one that included, notably, Marvin Gaye prior to his famous Motown days) on several songs Berry and Johnson recorded such as “Back in the U.S.A.” and “Almost Grown.” ROTHWELL, supra note 11, at 75–77. When James came to the rehearsals for the concert performance in Hail! Hail! Rock ‘n’ Roll!, the video shows Berry admitting he had forgotten recording with her. See HAIL! HAIL! ROCK ‘N’ ROLL, supra note 1 (“Chuck . . . [James] said, ‘did you know that was me singing the background to those songs?’ And he says, ‘really?’ But his piano player remembered that that was us.”).

60. I believe you will find that while examining Johnson’s as well as Berry’s testimony, concern will fade over who is more credible and which detail forty years later is correct, and you’ll simply be fascinated by this first-hand look into how these two supremely talented individuals recalled the creation of their art and what it can teach us about how we determine who receives the credit for, and rewards from, artistic creation.
A. He always had the lyrics written out.
Q. You are not claiming that you helped write any of the lyrics, correct?
A. Not a word.
Q. Not a word?
A. Only produced the music part.
Q. Did Mr. Berry have a tape player that he would bring sometimes?
A. Sometimes he would, yeah.
Q. And did Mr. Berry have on the tape player, music that he had played in connection with the song?
A. Yeah, he had that sometimes.
Q. He would have a melody?
A. He would have something down, and that’s why he would get my, see, he give me the go-light on, to put what I felt behind what he already had and blend it in, if it blended in right, or whatever, he would use that on the record.
Q. Would he tell you what he wanted you to play on the piano part?
A. No; no, he left that up to me.61

Here Johnson laid out some basic parameters of the process: (1) Berry would bring to Johnson, at minimum, words Berry had written that he intended to use as lyrics to be accompanied by music, and (2) sometimes Berry would bring more than just lyrics—he would have a certain amount of music to go with them. In the second scenario, would Berry deliver a complete musical melody to Johnson?

Q. For the songs that you claim that you participated in composing, did Mr. Berry ever bring the song to you with the melody already prepared?
A. Part of it, this is when I told you he gave me the go-light to put my own ideas into the songs that he would bring to me, that he had partially started.
Q. In any of these songs that you’re talking about, had the melody been completed by the time you met with him?
A. No. No.62

So, according to Johnson, the melody—a song’s standard feature—was not finished before the two of them began working together.63 So did he and Berry typically complete a song, melody included, all in one sitting? Or was it done over several occasions? To address the issue, Berry’s attorney referred Johnson to how he had answered a prior written interrogatory.

Q. Looking at your Answer to the Question 2, Question 2 is essentially asking you for details about how you participated in writing the songs . . . . Your first sentence of your

62. Id. at 144:13–144:22.
63. See supra notes 22, 28 and accompanying text.
Answer is, “The music in the songs that were co-authored by Mr. Berry and Mr. Johnson was often composed in more than one session,” let me ask you about that. What do you mean by that?

A. It’s only in the sense that we rehearsed it more than once.

Q. When you say “rehearsed it” —

A. What we did when we finally got what we wanted, we just kept rehearsing to make sure that was really what we wanted on the song, and we would go over the song more than once the day that we would be together, that we would have a rehearsal, we couldn’t do it once and say this is it, you keep going over-and-over, make sure there was no mistakes in there.

Q. In your view, is this rehearsal part of the composing process?

A. It is, yeah.

Q. That’s how you’re composing a song, is rehearsing it?

A. Right. 64

We see here how Johnson viewed the composition process: it did not consist of carefully writing out music in advance or instantly creating a song from nothing; instead, songs were formed over a period of time by rehearsing them. Where did this process begin: in the studio, a music hall, or earlier? Johnson explained:

Q. The next sentence [of the interrogatory answer] says, “Sometimes work on the music took place while Mr. Johnson and Mr. Berry were traveling by car from one gig to another, sometimes in hotel rooms.” Can you tell me how work on the music took place when you were traveling by car?

A. Well, he would write the lyrics while we were traveling, and he might orally sing these lyrics and try to give me an idea of how the song would go when we were playing it on the instruments; in other words, he would sing it to me, and from there, give me an idea of what we would do when we got where a piano was, that we could rehearse with a piano and drums and whatever.

Q. So, if I understand your Answer, there are two different things that would take place in the car that might be part of a composition process: One is, Mr. Berry would be writing out lyrics by hand; is that right?

A. Yeah; and then hum the tune that he thinks would get my opinion of what I could do with what he had in mind already.

Q. So, he would have some tune in mind, then he would sing it for you or hum it to you, and see what you would think?

A. Yeah, we did it that way, and we would just recite the lyrics that we had and see what we could do with it when we got to where we were going, or when we would have our first rundown on it.

Q. When you were in the car after he would tell you the lyrics, would you ever sing the tune back to him?

A. No, I never did any singing, I did all my singing with my hands.

Q. On the piano?
A. Yeah.

Q. Also, that sentence also says, “Sometimes the work took place in hotel rooms,” correct?
A. Right, he would be on his guitar and playing some of his changes, and letting me know what the song would sound like.

Q. What would you have been doing in the hotel room?
A. Listening; I would be listening to it, and all the same time thinking what I could play on the piano with what he was doing.

Q. So, you are listening to how he was playing the guitar, and listening to tell how the piano would fit in?
A. From what I would play on the piano or what I could add to this, to make it sound better than what he had, and a lot of times, he would like my ideas better than his own that he originally had.

Q. But he would be the one to make the choice as to which idea to use?
A. Yes.

Q. So, he would play something and you might have an idea, and he might accept it or might not accept it?
A. Yeah, he mostly would accept it.

Q. But it was his choice?
A. That was his choice.65

Johnson vividly illustrated the way he and Berry began with, as he saw it, the building blocks of a song: Berry would sing lyrics, sometimes paired with a guitar, and Johnson would listen. Berry also showed Johnson some of the song’s “changes” on the guitar, which were chord changes that Berry had already developed to go with the lyrics.66 Johnson at this point could only visualize what he would add musically and then communicate this to Berry, as there were no pianos in the cars or hotel rooms where these songs began. The two of them would have to get to a piano before Johnson could put his thoughts into action, a necessity he described with the wonderfully evocative phrase, “I did all my singing with my hands.” Berry would then have the final say over whether what Johnson proposed, through his hands, would go into the song.

Hotel rooms and cars, according to Johnson, were not the only places where these songs began. Johnson testified that the music was also “composed at . . . Mr. Berry’s house in Whittier; [Johnson’s] home

65. Id. at 173:16–176:16.
66. See Jimmy Webb, TUNESMITH 153–54 (1998) (noting that the foundation of a song is its chord structure, though cautioning that “writing a song is a fluid process wherein the major components can be freely interchanged almost as though . . . working on a zero-gravity construction site in high earth orbit”).
at 2024 Bond in East St. Louis; Mr. Berry’s studio on Easton (now Martin Luther King Boulevard); Mr. Berry’s studio in Wentzville; [and] Chess Studios in Chicago.”

Asked what songs they worked on at Berry’s Whittier house, Johnson recalled:

A. “Roll Over Beethoven”; what else did we do there? I think we started “No Money Down” there, also; in fact, we started quite a few of them there and ended up doing them on Easton, Martin Luther King now.

Q. That’s where Mr. Berry’s studio was?

A. Yeah, because when we first started, he didn’t have a studio, we were mostly running over these songs at his house, and then after awhile he got this studio on Easton, and that’s where we did most of the work at, until he got other studios, and the bigger he became, the bigger studios we had to work in.

Here Berry’s attorney posed another important question to Johnson: did Berry make audio recordings of his initial compositional work, such as his singing or guitar playing, before bringing it to Johnson? Or did he only sing or play live to Johnson, thereby beginning the compositional process?

Q. Did Mr. Berry . . . ever bring you, to your home or to the studio in Easton, a tape recording he had made, you know, of him playing the guitar and singing the song, just him on the guitar playing?

A. No.

Q. You don’t remember that at all?

67. Deposition of Johnnie Johnson Volume I, supra note 49, at 182:6–182:13. In yet another twist, nearly two years after Johnson filed his suit, his second wife, Roseland Johnson, attempted to intervene in the case. The thrust of the former Mrs. Johnson’s motion to intervene was that, given the fact of their marriage from 1952 to 1965 (the time period during which most if not all of the songs at issue were created), she should be entitled to a share of any monies her ex-husband recovered from Berry. See Memorandum in Support of Plaintiff-Intervenor’s Motion to Intervene, Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002) (No. 4:00CV1891). More pertinent to the suit’s copyright claims, however, was her allegation that during band rehearsals at the Johnsons’ house on Bond she “assisted . . . with some lyrics and titles to a few” of the songs co-authored by Berry and Johnson. See id. at 2. Roseland Johnson also alleged that there was a piano, which she had given her husband as a gift, in their house on Bond in East St. Louis that the band used for rehearsals. See id. at 1–2. This is intriguing because, as recounted elsewhere in his testimony, Johnson at first did not recall owning a piano during the time he and Berry were recording together. See Deposition of Johnnie Johnson Volume I, supra note 49, at 67:9–67:15, 70:4–70:10, 137:15–137:18. But then, during testimony about the songs themselves, he testified that indeed there was a piano in the house on Bond that was used by the band. See id. at 137. Ultimately, Roseland Johnson’s motion to intervene was denied, with the court finding it untimely, unnecessary in that Johnnie Johnson was already adequately representing any interest she had in the case, and improper in that her recourse (in the event of a Johnson win) would have been to file a claim in the Illinois state court where they were divorced. Order Denying Motion to Intervene, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891). As a result, Roseland Johnson’s allegations concerning the songs—and whatever other knowledge she may have had about their creation—were left unexplored.

A. No. 69

This appears to conflict with his prior testimony—earlier Johnson testified that Berry did sometimes bring him a tape. Though perhaps there’s an explanation. Previously, when asked if Berry brought him some music, like a melody, Johnson answered that Berry “would have something down” and would then give Johnson the “go-light . . . to put what [he] felt behind what [Berry] already had and blend it in.” 70

Here, when asked if Berry brought him a tape where Berry was singing the song—not the start of the song, or simply a part of it—Johnson answered no.

Absent the demo tapes, which might have shown if Berry (a) had completed the essence of the songs prior to bringing them to Johnson, (b) obtained Johnson’s input before completing them, or (c) if it was a mix of the two, we are left to ponder the exact nature of the songs’ beginnings.

3. Writing and Recording: Johnson’s Role and How He Understood It

Regardless of how and where the songs began, it was undisputed that they were ultimately recorded and released by Chess Records in Chicago, Illinois. Once Berry and Johnson brought the songs to Chess, did Johnson consider them to already be “final”?

A. Most all of them was in final form, at least we thought they were in final form, until maybe Leonard Chess would suggest something we did.

Q. At the studio; now, while Phil [Chess] was working the boards, what was Leonard’s job?
A. He was something like, how would you say it, editing the songs that we had already written.
Q. On the tapes?
A. Yeah.
Q. Was he the person who would select which of the particular recordings —
A. He was the one; he was the one.
Q. So, if you did several different takes of a song, he would decide which one to use?
A. Well, he would take the tape that we took him, he would listen to it and he would suggest something that he maybe thought could be improved, he would make a statement about it and we would maybe try what he thought would improve it; if it did, that would go on the record; if not, we would leave it as is.
Q. When you took his suggestions for improvement, did you feel that that entitled him to have his name as one the writers of the song?

69. Id. at 183:10–183:20.
70. Id. at 122:13–122:15; see supra note 61 and accompanying text.
A. No. No.71

The Chess brothers, Leonard and Phil, owners and operators of their eponymous record company, were, respectively, the producer and sound engineer who typically recorded the songs that Berry and Johnson would bring to the studio.72 Johnson explained how Leonard would first listen to their demo tapes—containing songs that were, most often, fully-formed—and how he would then oversee the official recordings, sometimes suggesting how the songs might be improved and always making the final decision on the form in which they were released.

Despite this, Johnson did not see the Chess brothers as co-writers. His view is one that, for reasons we will further examine, we are not compelled to share, but at this point we have simply learned more about how Johnson viewed the compositional process.73 On that note, what did Johnson have to say about his role in the process?74

Q. During that time period that you, up through 1966, as you mentioned, where you were working with Mr. Berry... did you ever forget about the fact that you were contributing this music to these songs?

A. No, I was just excited about doing the songs, it never occurred to me of what I was contributing to them. As I said, he would say, “Play what you want behind them, because you know my music,” and whatever, and this is, that’s what I would do.

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72. The Chess brothers came to record these songs by virtue of Berry—then unknown outside of St. Louis and East St. Louis—having walked into their offices looking for a record deal. See PEG, supra note 3, at 31–34 (detailing Berry’s 1955 trip to Chicago). For the full story of the brothers and their company, see COHODAS, supra note 11 (detailing the saga of the Polish Jewish immigrants, originally named “Czyz,” who co-founded one of the most significant independent record companies of all time, producing classic blues by Muddy Waters, Howlin’ Wolf, and Etta James, among many others, as well as rock and roll by Berry and fellow pioneer Bo Diddley) and JOHN COLLIS, THE STORY OF CHESS RECORDS 191 (1998) (including blues legend Buddy Guy’s colorful description of Leonard’s production style: “[Y]ou’d hear Leonard Chess say, ‘You’re playing it wrong, motherfucker,’ and you’d have to look up to see who he was pointing at, who the motherfucker was! My wife tells me I learned bad language from him!”). For fictionalized film portrayals of the Chess story, see CADILLAC RECORDS (Sony 2008) and WHO DO YOU LOVE (Alexander/Mitchell 2008). See also Adam Sandler, Competing Films Tell Chess Records Story, VARIETY (Nov. 17, 2006), http://variety.com/2008/film/news/competing-films-tell-chess-records-story–1117986041/. For further information on the roles of a record producer and engineer, including how an engineer works the sound “boards,” as referenced in Johnson’s testimony, see generally RICHARD JAMES BURGESS, THE ART OF MUSIC PRODUCTION (2005), GEOFF EMERICK & HOWARD MASSEY, HERE, THERE AND EVERYWHERE: MY LIFE RECORDING THE MUSIC OF THE BEATLES (2006), and PAUL MYERS, A WIZARD A TRUE STAR: TODD RUNDGREN IN THE STUDIO (2010).
73. See supra note 49, infra notes 132, 195 and accompanying text (further discussing the Chess brothers’ role in the Berry-Johnson recordings and potentially in the creation of the songs themselves).
74. “Co-write” was used interchangeably with “co-author” by Berry’s attorney. E.g., Deposition of Johnnie Johnson Volume I, supra note 49, at 123:8, 163:23.
Q. I understand that; let me try to rephrase my question, because I'm sure it wasn't clear. My question was: During the period of time that you were playing with Mr. Berry and recording these songs up through that time in 1966, as you mentioned, that you stopped working during that time, did you ever forget about the fact that you had helped compose these songs?

A. No, I couldn't have forgot.\(^75\)

The key here is that while Johnson was aware of his role, in terms of what he believed he was adding musically, he did not understand its significance. As Johnson described it,

A. . . . I didn't know, see, I was told and was brainwashed at the time that we made the recording, that we got paid for the recording, and if there was any royalties, if the record didn't sell anything, Chuck didn't get anything, so it was told to me by Chuck, as a matter of fact, you-all got paid, unless he got some royalties, he didn't get nothing unless they get royalties; so right away, that washed everything away as far as me getting anything out of it.\(^76\)

In other words, Johnson claimed he did not understand at the time he and Berry were creating the music that what he was doing constituted songwriting and that it entitled him to songwriting royalties. Johnson only came to understand much later—starting with a 1986 conversation with Keith Richards and through later conversations with other rock musicians such as Bo Diddley and Little Richard—the full significance of his contributions.\(^77\)

Aside from whether he thought of himself as a co-author of the songs when they were created, another key question hangs over how Johnson viewed his contributions: did he distinguish between using his piano to help complete a song that Berry had started versus creating a piano accompaniment to a song that Berry had already completed?

Q. . . . ([L]et’s say it’s a song that Chuck didn’t bring to you to work on, okay, just a song that he wrote and he decided, “I don’t want the Johnnie Johnson sounds on this song,” and he goes to another piano player and tells the piano player about the songs, essentially in the way that he would tell you about a song when he brought it, singing the words whatever it is, would you claim that you had any right to that song?

A. No, I wouldn’t.

. . . .

Q. Now, let’s say there is a song that Chuck had brought to you, and . . . got some input from you, and then decided that he would want to do it with someone else, so then he brought it to someone else and they went up to Chicago and met with Leonard Chess and played the various types, and then recorded something, would you claim any right to that song?

A. I sure would.

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\(^{75}\) Id. at 124:20–125:1.

\(^{76}\) Id. at 73:15–73:24.

\(^{77}\) Id. at 77–96.
Johnson believed, then, that simply performing on the recording of the song did not entitle someone to credit as its composer. It was whether his ideas were expressed in the song itself and not simply the playing of it that was, to Johnson at least, the key issue.

Q. So, if you had met with Chuck to go over a song and had come up with some concepts . . . and Chuck decided he was going to work with a different piano player on it, how would that piano player know what your musical concepts were?

A. Well, [Chuck] could play it on his guitar, because he definitely copied what I played behind him on his guitar, so he could easily show him that.

Q. How would Chuck show him the piano part?

A. Because the guitar and the piano part is played alike.

Q. Does the piano part follow the guitar part?

A. No, the guitar following the piano in the recording, because he's following my work.

Q. But the piano part and the guitar part are very similar; is that right?

A. I mean, you can hear that on the records.

Q. So, whichever one came first, if the piano came first, the guitar would naturally follow from what the piano played?

A. Right.

Q. And if the guitar came first, the piano would naturally follow from what the guitar played?

A. Right.

Q. So —

A. In the case of Chuck and I, yeah.

Q. So then, really, the question comes down to, doesn’t it, as to which one came first, the piano or the guitar?

A. Yeah; in other words, what idea came first, yeah.

Q. (By Mr. Jacobson) Would you agree that at issue in the case, is whether some portion of these songs was first created by you on the piano and then followed by Mr. Berry on the guitar on the one hand, or on the other hand as Mr. Berry contends, that the song was composed by him first on the guitar and that you then filled in on the piano?

A. I mean, that’s the way our teamwork came in together, whoever come up with the idea, it was tried by the both, he would try it, my piano part, which mostly I would do, I would try his guitar part, and together we collaborated on it together and find out which part worked the best, and that’s the one that would be used.79

So, Berry’s attorney attempted to frame the issue—whether Johnson’s ideas were incorporated into the song—as a basic binary concept: which came first, Johnson’s piano or Berry’s guitar? Johnson, significantly, would not allow their dynamic to be so simply defined. The flow of ideas among voice, guitar, and piano was ultimately fluid, and the end result would become the song.

Johnson proceeded to delineate his contributions vis-à-vis the work of the other band members. These usually included a drummer, typically Ebbie Hardy or Jasper Thomas, as well as a bassist, often Willie Dixon, who became part of the band when recording at Chess.

Q. . . . . What would Jasper Thomas know, assuming he was still alive today, about your participation in composing these songs with Chuck Berry?

A. Because he was there when we did the recording, and because he had a certain part to play in the recording, of the timing of the drums, the kind of beat Chuck wanted behind what we were doing, and the same thing with Ebby [sic] Hardy.

Q. Now, do you think that Jasper Thomas and Ebby [sic] Hardy should be considered as among the composers of these songs?

A. No.

Q. Why not?

A. Because they’re not playing music, they’re just keeping time.

Q. So, the drum playing is not music playing?

A. In a way of speaking it is, but it’s not playing a note.80

79. Id. at 261:10–265:1.

80. Id. at 321:4–322:16. See supra note 3 regarding the correct spelling of Ebbie Hardy’s name.
Johnson again gave us insight into his understanding of songwriting: a drummer may contribute to the recording, but a drum pattern is not part of the song because it is incapable of producing a musical note.\footnote{Again, as with the Chess brothers’ contributions, we are not compelled to take Johnson’s view of the issue. See supra notes 71–73 and accompanying text. Drums, as recent commentators have argued, may well create a rhythmic pattern that in certain circumstances can contribute to the creation of a song. Cf. Arewa, supra note 28, at 625–26 (arguing that courts’ focus on melody exhibits a bias towards European classical traditions and undervalues the importance of rhythm to African-American musical traditions generally and hip-hop in particular); Fleet, supra note 28, at 1271–72 (arguing that authorship under copyright law should be interpreted to “incorporate all musical and lyrical components resulting from a non de minimis contribution of expression”); supra note 28 and accompanying text. However, the main point here is what Johnson believed constituted the creation of the songs at issue. He did not think that a solely rhythmic instrument could contribute to a song’s creation. To him, more was needed.}  

But Willie Dixon, the bass player on the recordings, \textit{did} play notes.\footnote{Willie Dixon was a prolific blues artist and composer himself, credited as the writer of numerous songs performed by Muddy Waters and Howlin’ Wolf for Chess Records. See generally \textit{Willie Dixon with Don Snowden, I Am the Blues: The Willie Dixon Story} (1989). Dixon typically played an acoustic upright double bass, which is a great example of the bridge between jazz and boogie woogie to the new musical form of rock and roll. See, e.g., Rothwell, supra note 11, at 22–25. Jazz and boogie combos often employed the upright double bass instrument, whereas rock and roll would soon begin to utilize the electric bass guitar. See \textit{Charlie Gillett, The Sound of the City: The Rise of Rock & Roll} (3d ed. 1996); see also Guralnick, supra note 7, at 407–08. Of further interest to copyright law, Dixon later sued the rock group Led Zeppelin, alleging that their song “Whole Lotta Love” infringed his composition “You Need Love.” See Dixon v. Atlantic Recording Corp., 227 U.S.P.Q. 559 (S.D.N.Y. 1985). The case ultimately ended in settlement. Dixon with Snowden, supra note 82, at 218, 222–24.}

Did Dixon contribute anything that Johnson considered to be part of the songs’ creation?

Q. Now, you mentioned earlier, Willie Dixon, an employee of Chess records... did Mr. Dixon have any knowledge or information about your relationship with Mr. Berry?

A. Yes, he did.

Q. Can you tell me what Mr. Dixon knew?

A. Well, he helped, he helped out with being the fourth musician, he played bass behind a lot of our songs, and he was employed by the Chess brothers as part of the studio band, when an artist, like a singer or something would come in and want to record a song or something, Willie Dixon would get a little group together, play behind whoever wanted to make a recording; so, he was on quite a few of Chuck’s records.

Q. Did Mr. Dixon have any contact with you or Mr. Berry on a particular song, before that song showed up at Chess Studios in Chicago in its final form?

A. I doubt it and I couldn’t find out, because he’s passed now.

Q. Was Mr. Dixon, was he ever in your home, or in the car, or in the studio, or at the hotels?

A. Other than the studio in Chicago, no, he wasn’t in the rest of these places, that I know of.

Q. Did he ever contribute as a bass player, something new to any of these songs?
A. No, not that I know of, no more than adding another piece to the combo.\textsuperscript{83}

It becomes clear, then, that Johnson believed he expressed ideas through his piano playing that were used to create the songs, unlike Dixon’s bass playing, which Johnson considered to have simply accompanied the songs.\textsuperscript{84}

\begin{footnotesize}
\begin{enumerate}
\item Note 84: From this testimony, as well as his insistence that the songs’ melodies were incomplete before he contributed to them, it is fairly clear that Johnson distinguished between the arrangement of a song and its composition or, more specifically, between using his ideas to arrange Berry’s song and helping to create the song itself. See supra note 62 and accompanying text. Johnson also demonstrated elsewhere that he understood a difference between a song’s arrangement and its composition. Asked about the songs he allegedly co-wrote, as listed in the Complaint first filed in the suit, Johnson actually testified that he did not help create a number of them. Deposition of Johnnie Johnson Volume I, supra note 49, at 131:20–144:12.

Johnson readily admitted that he had not looked at the Complaint before it was filed and had not given a list of the songs to his lawyers. See id. While Berry’s attorney did not further ask Johnson how the list in the Complaint was generated, a review of it compared to songs included on the compact disc collection entitled \textit{Chuck Berry: The Chess Box} indicates that Johnson’s side simply listed the songs from that collection that were recorded by Berry and Johnson, minus “Maybellene” and “Johnny B. Goode,” which Johnson had already publicly acknowledged he did not help compose. \textit{Compare} Complaint at 3–4, Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002) (No. 4:00CV1891), \textit{with} CHUCK BERRY, CHUCK BERRY: THE CHESS BOX (Chess 1988). \textit{See also} PEGG, supra note 3, at 249 (quoting Johnson: “‘Maybellene’: He had that already put together when he met me.”). Apparently, it was not until Berry’s attorneys served their written interrogatories that Johnson was asked the details of how each song was created, and in his answers, Johnson clarified that a number of the songs should not have been included in the suit. See Plaintiff’s Answers to Defendant Charles E. Berry’s First Interrogatories Directed to Plaintiff Johnnie Johnson, at 1–4, exhibit A, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891). Asked again about the songs in his deposition, Johnson, on hearing their titles or by listening to the recordings themselves, stated which ones he recalled helping create. \textit{See generally} Deposition of Johnnie Johnson Volume I, supra note 49; Deposition of Johnnie Johnson Volume II, supra note 11. From this testimony, and corresponding corrective amendments to the Complaint, came the final list of songs. See supra note 11; First Amended Complaint, supra note 9; Plaintiff’s Motion for Leave of Court to Amend His First Amended Complaint by Interlineation, Johnson, 228 F. Supp. 2d 1071 (No. 4:00CV1891).

One of the songs listed in the original Complaint was “I’m Just a Lucky So and So,” and when asked in deposition if he had helped compose it, Johnson replied:

\begin{enumerate}
\item A. That’s not our song, but I helped with the arrangement of what we did do with that, yeah.
\item Q. So, you helped on the arrangement of somebody else’s song?
\item A. It’s Duke Ellington’s song, if you want to know the man that wrote that.
\end{enumerate}

\textit{Deposition of Johnnie Johnson Volume I, supra note 49, at 136:7–136:13. So again, Johnson demonstrated that he understood a difference between arranging and writing a song. However, with respect to the larger issue of how his final song list came together, Johnson’s testimony seems at best to reflect a failure to make the list as accurate as possible before filing the suit. The longer initial list of songs may have also put more pressure on Berry to settle the case, i.e., more songs meant more dollars lost if Johnson would have won. But if this was an intentional move, it was problematic both ethically and, ultimately, strategically, in that Berry’s side could have used it to box Johnson in at trial, arguing that he did not care enough to review his suit before filing, or worse, that he couldn’t keep straight which songs he claimed to have written, or worst, that he wanted to create false settlement leverage against Berry.

Nevertheless, from an historical perspective, I think this situation actually increases, paradoxically, the credibility of Johnson’s final song list. If Johnson was involved in

In what would prove to be a pivotal moment, Johnson, asked about how his ideas were incorporated into the songs’ melodies, volunteered the song “Nadine” as a representative example.

Q. Is there like a main musical melody, you know, that if you just heard people, what people sometimes refer to as the tune, you know, every song has a tune, is there—you know, I'm not talking the language you understand, because I'm not a musician, I'm just trying to talk about something I don’t know that much about, you’re the expert on this.

A. No, I’m not an expert, but like I say, I play by ear and I play what I feel. Do you have the record “Nadine” there?

Q. Yes, I do.

A. Play that and I can kind of express that.

Q. All right, “Nadine” is at cue, which is, would be 1964, it looks like CD No. 2.

A. Now, I’m not going to play along with this, I’m going to show you definitely the part that I put in, that made the whole song work out just right, and if he wanted to use horns or whatever, this would be the horn part.

any pre-suit plan to inflate the number of songs he claimed he helped create, it would make little sense to give the game away so easily in his interrogatory answers and deposition, willingly stepping into the trap Berry’s attorneys could have sprung at trial. And a generally evasive or untruthful witness would likely have tried to avoid admitting that he did not review the Complaint or help write all of the songs recited in it. But Johnson simply admitted that he did not read the Complaint before its filing and matter-of-factly proceeded to testify which of the listed songs that he did, or did not, help create.

And if this all wasn’t complicated enough, a closing observation: it is possible that Johnson’s song list was actually underinclusive. If, as detailed above, the original list was generated from Chuck Berry: The Chess Box tracklist without Johnson’s input and was narrowed down from there by Johnson’s testimony, then Johnson was never asked about a number of more obscure songs attributed to Berry and recorded at or around the time the songs on Chuck Berry: The Chess Box were recorded. These include “Together (We Will Always Be),” “I’ve Changed,” “La Jaunda,” “Blue Feeling,” “Low Feeling” (which is just a slowed-down version of Blue Feeling), “How You’ve Changed,” “Guitar Boogie,” “Night Beat,” “It Don’t Take But a Few Minutes,” “Blues for Hawaiians,” “Vacation Time,” “21,” “21 Blues,” “Oh Yeah,” “Hey Pedro,” “Anthony Boy,” “Do You Love Me,” “Run Around,” “The Little Girl From Central,” “O Rangutang,” “My Mustang Ford,” and “Wee Hour Blues.” ROTHWELL, supra note 11, at 25–142. Listening to these songs, one gets the impression that Johnson did not play on at least a few of them, such as “It Don’t Take But a Few Minutes,” “Ingo,” “Blues for Hawaiians,” and “Hey Pedro,” given their very rudimentary piano accompaniment or apparent lack of piano, but Johnson likely could have clarified this, as well as clarifying whether he claimed co-authorship regardless, had the recordings been played for him in preparation for the suit or at his deposition. See CHUCK BERRY, JOHN B. GOODE: HIS COMPLETE 50S CHESS RECORDINGS (Geffen 2007); CHUCK BERRY, YOU NEVER CAN TELL: HIS COMPLETE CHESS RECORDINGS 1960–1966 (Geffen 2009); supra note 79 and accompanying text.

One truly notable omission from Johnson’s final list is “Little Queenie,” a very influential and oft-covered song credited to Berry. See ROTHWELL, supra note 11, at 73–75. It was included on Chuck Berry: The Chess Box, and Johnson’s biography recounts that he recorded it with Berry, so absent another compelling reason for not including it in the suit, it simply appears to have been overlooked. See FITZPATRICK, supra note 3, at 151; CHUCK BERRY, CHUCK BERRY: THE CHESS BOX, supra note 84.
The first part Johnson claimed he created is the horn riff that accompanies the chorus from "Nadine" (i.e., each time Berry sings "Nadine . . . is that you?"). A listen to several different versions of "Nadine" cited to in the footnote below further shows how the song sounds with this horn riff and without it, allowing us to consider for ourselves what effect it had on the song. In my view, there is a
strong case that the riff provides the song’s main hook, forming the central part of “Nadine.”

5. “Johnnie’s Boogie”

As a final point on his contributions, Johnson discussed the piano style he typically employed on the songs. Johnson did not call the style rock and roll because rock did not exist when he learned it. The style is known instead as “boogie woogie” or just “boogie.”

Q. In your [Interrogatory] Answer, you also say, quote, “Virtually all of the songs that were co-authored have a shuffle beat behind them. This left-hand boogie-oriented shuffle is pervasive throughout the Berry-Johnson songs, including ‘Roll Over Beethoven’, ‘School Day’, and ‘Sweet Little Sixteen’,” end quote. Can you explain what a shuffle beat is?

A. Da-da-da-da-da, you never stop, you’re steady going, you never stop making the change, it’s just a steady roll of the bass most of the time.

Q. So, your hands are sort of escalating up one way and then down the other way; is that right?

A. Right.

Q. Is that something that’s common in boogie songs?

A. That is boogie.

Q. Is that something that you invented, or something that was out there in the world before you came along?

A. Even before I was born, people been playing that.

Q. In fact, is that something that’s used by many boogie piano players?

A. Right.

Boogie woogie, as Johnson indicated, has its roots in the late nineteenth century, many years before he was born. Boogie is a variety of blues and jazz that, “aside from its immense vitality,” has as its “most striking characteristic . . . the rapid, incessant rhythm of the recurring bass figures, usually of a jerky or rolling nature.”

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88. See supra note 29 and accompanying text for a definition and discussion of riffs and hooks.
Woogie takes almost without exception the form of the twelve-bar-blues, repeated with endless variation, but always in the same key.\textsuperscript{91} And, “in making full use of the resources of the instrument,” as the seminal work \textit{Jazzmen} describes, “the Boogie Woogie is the most pianistic of all jazz styles.”\textsuperscript{92} Boogie’s most prominent practitioners during its 1930s heyday included the pianists Pinetop Perkins, Albert Ammons, and Meade Lux Lewis, the last of which Johnson would cite as a key influence.\textsuperscript{93}

Q. . . . [Y]ou mentioned there was a piano player that sort of developed that boogie-woogie shuffle sound . . . ?

A. Mea[de]—I can’t pronounce it right now, Mead[e Lux] Lewis.\textsuperscript{94}

Q. Mea[de Lux] Lewis.

A. Yeah.

Q. . . . Was this piano boogie shuffle portion, was that something you had heard as you were playing in Chicago?

A. Oh no, I heard this years and years ago, it’s something that I liked when I heard it and I learned it, and I add some of my own ideas to it, and this is what I use in most of the background of Chuck’s lyrics that he had brought to me. In other records, you can hear more plainer than you could in “Maybellene”, because that was our first record, and I don’t think either one of us know what was happening as far as the recording session.

. . . .

Q. So, to make sure I understand, is there a large body out there of different sort of standard piano-type of phrasing, like the boogie-woogie, the Mea[de Lux] Lewis one that you just told us about, are there other ones out there that are sort of standard repertoire of blues and rock and roll piano players?

A. That could be.

Q. I mean, you’re the pianist, so I don’t know, I mean, you’re the person who would know. Is there something, do you have sort of almost like a recipe book of different styles or arrangements of piano playing that you can call upon and modify a little bit to fit the song, how does that work?

\textsuperscript{91} Id.

\textsuperscript{92} Id. at 183; see also \textsc{Peter J. Silvester}, \textit{A Left Hand Like God: A History of Boogie-Woogie Piano} 3–8 (1989); \textit{Boogie Stomp!} (John Campana 2012). \textit{Boogie Stomp!} is a documentary film directed by Robert Baldori—a piano and harmonica player who has worked with Chuck Berry both live and on record—that tells the story of boogie’s history as well as Baldori and fellow pianist Robert Seeley’s quest to bring it back into mainstream popularity. See \textit{Boogie Stomp! The Movie}, \textit{Boogie Stomp!}, http://www.bowofo.org/ (last visited Mar. 20, 2015). For some additional essays and photographs on boogie woogie’s past, present, and future, see \textit{Boogie Woogie Found.}, http://www.bowofo.org/ (last updated June 18, 2014).

\textsuperscript{93} See Russell, supra note 90, at 187.

\textsuperscript{94} It says “Meatlock” Lewis in the transcript, but because there does not appear to be any “Meatlock” Lewis—but there definitely was a Meade Lux Lewis, whose “Honky Tonk Train Blues,” in particular, influenced Johnson—this is just a mistaken transcription. See \textsc{Fitzpatrick}, supra note 3, at 119; Russell, supra note 90, at 187.
A. Well, with me, I play by ear, and other like the books that have what they call fake changes and all that in it, I never used one, the only thing I play is from my head, I mean, from my ear.

Q. From listening to other piano players?

A. Or records, or recordings, or whatever, and then I have my own ideas of my own, I have ideas of my own also.

Q. Is it based on sort of the sound or the notes that [Berry]'s singing, and you work off of that?

A. No, there is a lot, it goes by a lot of what you, sometimes you can hear a song for the first time, you almost know where they're going from the first [chorus] that they sing, you can feel what they're going to do next, and the same way on the piano, it got so that we stayed together so long, we could almost just look at each other and tell what the other one wanted him to do in the changing of the song; I mean, not being a musician, it's hard to explain to you, but you can almost feel what to do without, especially playing by ear, because you don't have any notes in front of you, so you have to play, do it orally, and I guess I just have that gift to know this.

In sum, Johnson’s testimony described a process in which he would—by marshalling his formative musical influences augmented by his own ideas—work with Berry to develop the fragments that Berry would bring him in order to create fully formed songs. Johnson’s inherent musical ability and style, his “gift” as he called it, was what Berry valued, which Berry would soon readily testify to in his own deposition. The key question we are left with going into Berry’s deposition: did Johnson’s gift help create the songs or simply improve the songs Berry created? The answer was and is a difficult one, even to Berry, as his testimony demonstrates.

C. Berry Testifies (“All of this is in our souls now.”)

On August 21 and 22, 2002, Chuck Berry, attorneys at his side, testified in the case. Just as Berry attended Johnson’s deposition, Johnson attended Berry’s, again accompanied by his biographer Travis Fitzpatrick. Berry, as one would expect, disagreed with many key points from Johnson’s testimony, but he testified very similarly concerning how they interacted musically. The main disagreement was whether this interaction resulted in the songs’ creation or if Johnson simply played what Berry instructed him to play within the framework of Berry’s songs.

95. It says “course” in the transcript here, but given the context, it almost assuredly should say “chorus.”
97. Deposition of Charles E. Berry Volume I, supra note 19, at 1, 3; Deposition of Charles E. Berry Volume II, supra note 11, at 182, 184.
Johnson’s attorney Mitch Margo tackled this central issue early and often, asking Berry a variety of questions about the songs’ creation. The initial springboard for the questioning was the song “Wee Wee Hours,” which, along with “Maybellene,” was the very first record Chess released by “Chuck Berry and His Combo.”

1. Creation at the Cosmopolitan Club: “Wee Wee Hours”

Johnson had previously testified that—as opposed to the other songs at issue—he had composed the music for “Wee Wee Hours” by himself before he began playing with Berry and that it was his “theme song” at the Cosmo Club. So, Berry’s position on that particular song is an obvious point of interest—did he disagree with Johnson, and if so, how did Berry claim that the music for “Wee Wee Hours” was created? Additionally, it becomes instructive for us how, as the deposition proceeded, Berry’s testimony about “Wee Wee Hours” transitioned into a larger discussion of the general process by which, according to Berry, the songs were created.

Q. Let me ask you about “Wee Wee Hours,” if I could for a moment. . . . Is it your testimony that you wrote both the lyrics and the music to “Wee Wee Hours”?

A. This is, that’s my testimony, yes, that’s how I answer that.

Q. Do you remember anything about what motivated you to write “Wee Wee Hours”?

A. The blues-loving people of, I guess, Cosmopolitan.

Q. . . . Can you tell me any more about your inspiration for writing either the words or the music to “Wee Wee Hours”?

A. Well, something you asked me, there was no “Wee Wee Hours” before, there was no music to “Wee Wee Hours” before “Wee Wee Hours” was “Wee Wee Hours”, if you can understand that.

Q. I can’t.

A. “Wee Wee Hours” became “Wee Wee Hours” after we had recorded it, it was named “Wee Wee Hours”.

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98. “Maybellene” was on the “a”-side of the record, with “Wee Wee Hours” on the “b”-side. 1 Morten Reff, Chuck Berry International Directory 15–17 (2008).

Q. How did that happen?
A. We physically put it on the record. Is that what you mean?
Q. Well, that's what I'm trying to figure out, you said that it became “Wee Wee Hours” later?
A. The name, the title “Wee Wee Hours” became the title of “Wee Wee Hours” before “Wee Wee Hours”.
Q. Didn’t the title “Wee Wee Hours” come from the lyrics to that song?
A. Well, the title of “Wee Wee” — the music to “Wee Wee Hours” came to be “Wee Wee Hours” after, it could have been named “Wee Baby Blues” from which my speculation of the song came from, my feeling of the song came from, from Joe Turner's “Wee Baby Blues”, but you cannot name a song the same, even though it maybe have the same progress, progression, which means the following of the music.
Q. Correct me if I'm wrong, are you telling me that you wrote the music for “Wee Wee Hours” based on some music from, called “Wee Baby Blues”?
A. Inspiration, feeling, the feeling of the blues, yeah.
Q. With regard to the song that's now known as “Wee Wee Hours”, did you write the music first or the lyrics first?
A. I guess the lyrics, yes.
Q. Where were you when you wrote the lyrics?
A. I would, I don’t know, I would imagine at home.
Q. . . . I don’t want you to speculate, can you remember where you were?
A. 4319 Labadie.
Q. So, you remember that you wrote those lyrics at 4319 Labadie?
A. Yes, during the time I lived there, you know, because that's where all my inspiration came from.

Here Berry laid out some initial basics regarding the creation of “Wee Wee Hours”: (a) he wrote the lyrics first at his home on 4319 Labadie in St. Louis; (b) he wrote the music for the “blues-loving people” of the Cosmopolitan Club; and (c) he drew inspiration from another song, “Wee Baby Blues.”

Berry's testimony, then, directly refuted Johnson's. He created the music to “Wee Wee Hours,” not Johnson. But Berry also stated in a somewhat cryptic fashion that “Wee Wee Hours” was not “Wee Wee Hours” until it was recorded, an important point on which he would elaborate as his testimony progressed. First, however, Berry

explained how he introduced this song to the band and specifically to Johnson.

Q. Now ... there was a period of time that you were playing with the Johnnie Johnson Trio prior to the time that you recorded “Maybelline” and “Wee Wee Hours” at Chess Records; do you recall that?

A. Yes.

Q. I’d like to focus in on that time. During that time did the Johnnie Johnson Trio play the song that we know as “Wee Wee Hours”?

A. Yes. I showed them how to play it.

Q. So, you introduced that song to the Johnnie Johnson Trio?

A. Along with the lyrics, yes.

Q. Just so I’m clear, both the music and the lyrics are something you introduced to Johnnie Johnson?

A. Definitely.

Q. How did you teach Johnnie Johnson to play it on the piano?

A. Well, I think that “Wee Wee Hours”, it’s so simple, I think I showed him what to play.

....

Q. Show me what you showed him.

A. Yes, sir.

(Whereupon, the Witness demonstrates on the guitar.)

THE WITNESS: And it goes on through a whole chorus, and then chorus after chorus. . . .

(Whereupon, the Witness demonstrates on the piano.)

....

THE WITNESS: That’s as much as I played there, and of course, Johnnie played with two hands, you know, he plays

(Whereupon, the Witness demonstrates on the piano.)

THE WITNESS: And so forth.

Q. (By Mr. Margo) But aside from what you just did ... with two hands on that keyboard, is that what you showed him or was it just what you had done on the guitar that you showed him back then, with regard to “Wee Wee Hours”?

A. I really don’t know, I could have played it, because it’s simple, it’s very simple, and what I played with my left hand is progression, and any person would follow with that same thing if they heard the top.102

Delving into detail regarding the creation of “Wee Wee Hours,” Berry described what seems to have been a simple process. He showed Johnson on the piano how to play the music to the song, which is, according to Berry, a simple blues chord progression that anyone

would play in accompaniment to the “top,” which in context presumably means the melody in Berry’s vocals. However, upon hearing the original recording at the deposition and when asked about Johnson’s piano playing, Berry began to detail a more complex way in which the music to “Wee Wee Hours” developed.

Q. The piano playing that we heard on “Wee Wee Hours” was all put in there by Johnnie Johnson, wasn’t it?
A. It’s put in there because I asked him to fill it in.

Q. Would you regard everything that we just heard played by the piano player, Mr. Johnson, as fill-in?
A. It definitely was, if he would have played while I was singing the lyrics, it wouldn’t have happened, the whole song wouldn’t have happened, on not only that song but any song.

Q. I’m sorry. Now I don’t understand.
A. Okay.
Q. Would you mind explaining to me what you’re trying to say?

A. I’m trying to say that when you hear (indicating), this is on any song that’s slow, I think you’ll hear that in Johnnie Johnson’s music, that’s Johnnie Johnson’s style. I heard it long before maybe we ever went to the studio to do “Maybelline” [sic]. I liked, I liked his style, on the contrary—not on the contrary—in addition, Johnnie liked my style of leading him into these (indicating) things. These are songs that you won’t hear, we were playing for $4.00 a night, it didn’t matter what we played, we weren’t getting paid peanuts. Now, when we went to record, all of this is in our souls now, and I said, “Johnnie, fill in, you know, with something when I’m not singing,” you know, the basic of the song da-da-da-da-da, and he even plays that during the lyrics—during the, yeah, the lyrics being performed. That’s what I mean by fill-in. Whenever I’d get through singing, I would look at Johnnie and he would fill in those turns back to the next phrase or stanza, if it was poetry, and then, because I needed this, you know, I wanted this in the song, and I had never heard it before, we had never met, you know.\footnote{103}{Id. at 46:14–48:15. Per the video of the deposition, this last part, reported in the transcript as “and I had never heard it before, we had never met, you know,” is unclear, with Berry’s words running heavily together. To my ear, it is more probable that he said “and in fact, I’d heard it before we, we ever met, you know.” Video of the Deposition of Charles E. Berry, at 11:11:10–11:11:14 AM, Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002) (No. 4:00CV1891) (on file with the author).}

The final answer in this portion of testimony, in particular, starts to give us insight into how Berry viewed his and Johnson’s musical relationship. “[A]ll of this is in our souls now” is the most interesting line here. What is “this”? It is the music they played for four dollars a night at the Cosmo Club. A musical language developed there between them, one which ingrained itself in their souls and which they could harness when the tapes began to roll at Chess studios.
Q. And at the time you first played that song, “Wee Wee Hours”, with the Johnnie Johnson Trio as you told me earlier, had you hired Johnnie Johnson to play that song that way?

A. Yes. I don’t know if it that was song, see, but we played songs that way, you know.

Q. I’m talking about this song.

A. Well, this song was created and completed in Chess Studios, so I can’t say before it was recorded.

Q. Well, I thought you told me earlier that you were playing this song, “Wee Wee Hours”, as part of the Johnnie Johnson Trio before you went to Chess Studios the first time.

A. I’m not too sure; I wouldn’t reject that, but see, when you say, when you say “Wee Wee Hours”, “Wee Wee Hours” became “Wee Wee Hours” in the studio before we called it “Wee Wee Hours”, but who knows, I mean, the world doesn’t know, it became a legitimate, this song here that we listened to became legitimate after we recorded, and everything on it is just like we left it in Chicago. Now, it’s this song is “Wee Wee Hours”, it’s the same song that we may have been doing prior.

Q. That’s what I want to ask you: Do you recall doing this song prior to going to Chicago?

A. The title of it, yes.

Q. What about the music?

A. The music could have varied.

Q. When you say it could have varied, can you explain to me what you mean?

A. I mean, it might have been a jam session, it wasn’t confirmed to be “Wee Wee Hours”. It might have been another song entirely with the same music, blues are like that, they have the same music.

Q. Well, tell me what was a prior “Wee Wee Hours”, if there is one. You didn’t rehearse it first before you went to Chicago?

A. That’s what all the, what do you call it, the production at the Cosmopolitan came to be, a rehearsal for what we’re hearing.

Q. Would that be the same for the other songs that you recorded when you first went to Chicago, “Maybelline” [sic]; I believe, “Thirty Days”; and “You Can’t Catch Me”?

A. Pretty-much so, but I’m trying to think if we ever did any rehearsing at the Cosmopolitan, and that’s about the only place that we would have, because most of these songs I created actually in the session, we might have played songs like it, like “Roll Over Beethoven” is about the same progression as “Johnny B. Goode”, or “Carol”. Rock and roll is so simple that you can hardly distinguish any specifics about either song.104

Berry seemingly jumped back and forth on whether “Wee Wee Hours” was created before they recorded at Chess or during their studio session. Berry appears to have considered only the final released recording of “Wee Wee Hours” to be the song, and he regarded

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anything that the band played at the Cosmo Club—even if it was the same music or used the same title—as something else.

2. A Song is Not a Song Until It’s the Song

Interestingly, Berry also offered that certain key songs like “Roll Over Beethoven,” “Johnny B. Goode,” and “Carol” may have started developing from the “simple” rock and roll that the band played at the Cosmo Club, while other songs were created solely in recording sessions. Taking the cue, Johnson’s attorney bridged from “Wee Wee Hours” to Berry’s creative process in general.

Q. Just so I’m clear, you just told me that, “most of these songs I created in a session”. Do you recall just saying that?
A. I said, were created.
Q. Most of these songs were created in the session?
A. Yes.

Q. So, let me ask you first: When you say “the sessions”, do you mean when you, and Mr. Johnson, and Ebby [sic] Hardy, and maybe Willie Dixon, got together to either rehearse or play gigs?
A. Yeah. I could change that to all of these songs were created, because a song is not, to me, is not a song until it’s confirmed, it’s confirmed in the session when we say, okay, this is this song, if it bears the same title that we brought up, yes.
Q. You used the word “confirmed”, I just want to be clear, is the song confirmed when it’s recorded and set in stone and that becomes the song, in your mind?
A. According to my answers to you, yes, because it’s not that song until it’s there.
Q. It’s always a little different prior to the time that you put it down on recording tape, and that’s it?
A. Yes, because all the other things were rejected and they became no song until the final song.105

Berry clarified here what he meant by “Wee Wee Hours” not being “Wee Wee Hours” until it was recorded. To him, a “song is not . . . a song until it’s confirmed” on the recording.106 At that moment, “all the other things” previously tried with the music were “rejected and they became no song until the final song.” Berry elaborated:

105. Id. at 55:9–57:8.
106. John Lennon was quoted along similar lines: “[E]ven with ones where we’d have it 90% finished, there’s always something added in the studio. A song is—even now when I write a song—not complete . . . because it changes in the studio.” THE BEATLES, THE BEATLES ANTHOLOGY 98 (Bryan Roylance et al. eds., 2000).
Q. Let’s go back to the earlier statement, which first I think you said, most of the songs were created in the session, and then you corrected, you said all of the songs were created in the session.

A. Yeah, I’m explaining, creation means that it isn’t that song until after it’s named that song and then put down on a record and came out that way; you know, then it is that song, regardless of what we call it. “Maybelline” [sic] was “Ida Red” until we got out of the studio and he said you can’t name this “Ida Red”, because there is already a song “Ida Red”; “Maybelline” [sic], that was very easy to change the name of the song, because nothing rhymed with the “Maybelline” Maybelline” [sic] that I had to—I mean, nothing rhymed with “Ida Red”, that I had to “red”, “bed”, “head”, “said”, to rhyme with the song, so it might be “Maybelline” [sic] was just put in there to rhyme with the rhythm of “Ida Red”.

Q. I want to get to that in a minute, but before we do that, if we can agree that a song doesn’t become a song until it’s recorded at the studio and it’s set down on tape—let me finish, okay? I’m going to agree with you, that that song is not a song, it’s not “Wee Wee Hours” until it’s recorded and done in Chicago. Can we call what happened before that song, the evolution of that song, what was done to get to that point? I want to refer to it as the evolution of that song; is that okay with you?

A. Okay; good.

Q. So, would it be correct then, with all of the songs that were created in the session, what we’re referring to is the evolution of those songs, the practice, the rehearsals, the making sure that when you do this, Johnnie does that, and Ebby [sic] does this, that all happened before you got to Chicago to record these songs, didn’t it?

A. I can’t answer that, because you’re saying all of the songs. Most of the songs were written independently of their own accord, and when you say all of the songs, they did not progress in their creation in the same manner or in any duplicate manner. “Every”, to me, I think every song had its manner of root, had its roots of how it was recorded.

Q. Roots, I think that’s a great word, let’s use that word.

A. Okay.

Q. Every song had a little different roots to get to recording?

A. Yeah, to get to the space, yeah.

Q. The roots of “Wee Wee Hours”, were you, and Ebby [sic] Hardy, and Johnnie Johnson, playing blues tunes that eventually were recorded as “Wee Wee Hours”?

A. Some of, maybe all of that became “Wee Wee Hours”.

Q. That piano playing was, as you described it, Johnnie Johnson’s style, it wasn’t Chuck Berry’s style, it was Johnnie Johnson’s style?

A. Well, yeah, there is no other style like Johnnie Johnson.

Q. Can we use that same term, that part of that song, the Johnnie Johnson style that ended up in a song, is the same for all of your songs that you and he did together in the early years?

A. Well, it’s what I requested; if it was what I requested, I’d say, you say, was it his style? Definitely, I requested his style.

Q. But you never wrote down the piano notes he was to play, you just said, “Here’s what I’ve got, Johnnie, fill in.”

A. “Here’s what I have, Johnnie, can you fill this in?”
Earlier Berry had generalized that all the songs were created in the Chess recording studio, but he now specified that they each took a different route to get to that point. To use the homonym selected by Berry, each had a different “root” from which eventually sprouted the final recorded song. “Maybellene,” their first and many say greatest recording, came from a traditional country song “Ida Red” that Bob Wills had popularized in the late 1930s and ’40s and which Berry and Johnson had played at the Cosmo Club. Berry had changed the lyrics to the song but kept the same name and music until they arrived at Chess, where the name was changed to “Maybellene.”

In a similar fashion, “Wee Wee Hours,” Berry now stated, came from the blues tunes that Berry, Johnson, and Hardy were playing at the Cosmo.

Thus a more fluid and complex creative picture develops: rather than a song composed alone by Berry and shown to Johnson,


108. See id. at 68:7–71:27, 72:7–72:15 (“‘Ida Red’, the feeling of ‘Ida Red’ was the roots of ‘Maybelline’ [sic]; the feeling of ‘Ida Red’ was the feeling of ‘Maybelline’ [sic]. I even did the hillbilly production movements of it, stomping the foot and even dialogue.”); Deposition of Johnnie Johnson Volume I, supra note 49, at 27:14–27:21 (“‘Maybellene’, was called ‘Ida Red’ before we took it to Chess, and Chess liked it, but he couldn’t produce it under that name, because it was a song that was already out, they had to change the lyrics and everything, and it became ‘Maybellene’. He couldn’t figure out what the name is, so when we saw this mascara box up under the window with ‘Maybellene’ on it, and Leonard Chess said, name it ‘Maybellene’, so that’s how that came about.”); PETER GURALNICK, FEEL LIKE GOING HOME: PORTRAITS IN BLUES AND ROCK ‘N’ ROLL 234 (1999) (“In 1955 Chuck Berry walked into the Chess offices. ‘He was carrying a wire recorder,’ said Leonard [Chess], ‘and played us a country music take-off called ‘Ida Red.’ We called it ‘Maybellene.’”). Compare BOB WILLS & HIS TEXAS PLAYBOYS, Ida Red (Columbia Records 1947), available at https://www.youtube.com/watch?v=Xvw4_YOWNXM, with CHUCK BERRY & HIS COMBO, Maybellene (Chess Records 1955), available at https://www.youtube.com/watch?v=75RiHJGfyUE.

As a final note on the origins of “Maybellene,” Chess Records struck an under-the-table deal with prominent 1950s radio disc jockey Alan Freed and Chicago landlord and stationery manufacturer Russ Fratto to list them as Berry’s co-writers on the copyright registration. See PEGG, supra note 3, at 42–44. Freed and Fratto, accordingly, each received a share of the royalties from Maybellene—Freed for regularly playing the song on the radio, a form of the practice known as “payola,” which would later get both Freed and Chess into legal trouble, and Fratto probably to pay off some debt Chess owed him, though Fratto may have made a cash payment to Berry in exchange for the authorship credit. See COHODAS, supra note 11, at 118 (“Copyright records suggest that Freed and Fratto were prolific songwriters, which no doubt would have surprised those who knew them well. Freed was credited with some twenty-eight songs for a variety of companies, Fratto a dozen.”); PEGG, supra note 3, at 42–44. Berry has denied participation in (or advance knowledge of) the scheme, and much later he secured sole ownership of the copyright in “Maybellene,” presumably through the copyright renewal process. PEGG, supra note 3, at 42–43; CHUCK BERRY, CHUCK BERRY: THE AUTOBIOGRAPHY 110, 119 (1987); see also 1 NIMMER & NIMMER, supra note 19, § 9.05 (summarizing the renewal process under federal law).
Berry now described “Wee Wee Hours” as stemming from various blues songs played by their band at the Cosmo Club.

3. We, I, and My: Tension and Harmony

Berry next proceeded to detail a key aspect of his overall relationship with Johnson: he never told Johnson exactly what to play, but rather asked Johnson to fill his own style into what Berry brought him. What then did Berry bring to Johnson?

Q. Did you ever discuss with Johnnie, the creation of these roots that we’re talking about, where you said, “I’ve got some lyrics, what do you think, should this be a fast song or a slow song?”, or had you already determined all that before you ever talked to him?

A. No. Frankly, actually, I didn’t have to, there was a harmonious understanding after a few recordings, that when I stop singing, Johnnie played this riff, or that riff, or that riff, and there are some ones that I can name, played the riff and he played it and played the da-da-da-da riff. I could implicate the rhythm and he would remember the thing that I liked so much, and the same thing would happen, turned around, when I would play the riff, that I’d ask him to play a certain thing, seemed like to me, he would just fall in; and today, that same harmony exists, you know, if we play somebody else’s song, if I played a certain riff, Johnnie would follow, if Johnnie played a riff of his own, if we’re, what do you call it, jamming, that riff would remind me of what to induce him to play it again; and musicians have these, you can play a seventh and that means it’s time to change, you could play a sixth and that means that we’re ending, this is the ending, and that comes to musicians, and the harmony there causes you to be compatible in understanding what the leader wants in the song if he’s composing it.

Q. This harmony that you’re describing between you and Mr. Johnson, or compatible –

A. That’s not musical now, that’s mental.

Q. Mental harmony?

A. Yeah.

Q. Would it be correct to characterize it as, you guys were in sync with each other, you just knew what each other was going to do?

A. Yes, that’s the rhythm, yeah, we were pretty-much in sync.

Q. Isn’t that the way that you handled the sessions you were describing, and that would be the period prior to going to record?

A. “Handled the sessions?”

Q. Isn’t that what was going on in the sessions, this harmony, this compatibility prior to going to record the songs?

A. Well see, they’re seldom, I don’t recall any priority, any prior in practicing, because it seemed like to me, we did all the setting the blues, my songs are, my own songs rather than copying “Route 66” or a Nat Cole song, they’re so simple that you can play one song and sing the lyrics to another song; so I mean, it was pretty-much, it was the rhythm and the harmony that we played together that made the song, songs different, we wouldn’t play the same riff in “Carol”, which is one song, as we would play in “Johnny B.
Goode", because we wanted to make it different, I wanted to make it different, you know. Berry described a process where he and Johnson communicated with each other through the music rather than verbally; instead of discussing how they worked, they simply worked. And they did so with, in Berry's words, a "harmonious understanding" of what each other was going to do. When Berry played a riff, Johnson knew how to follow it; when Johnson played a riff, Berry knew where to take it.

Berry assumed ownership of this process by calling himself its "leader." On the other hand, Berry used the word "we" several times in this part of his testimony: "we did all the setting the blues," "the rhythm and the harmony that we played together," and "we wanted to make it different." This last "we" Berry quickly corrected to an "I"— "I wanted to make it different." Perhaps this clarification came because he realized the importance of his last "we." Berry was speaking about how the songs—which he earlier said are hardly distinguishable—were made different from each other musically, which in turn would seem to be an indicator of authorship. The tension among "we," "I," and "my" is palpable.

Also noteworthy, particularly given his further testimony below, is that Berry referred to a situation where "Johnnie played a riff of his own." It is unclear whether Berry was talking about Johnson originating a riff or rather about Johnson selecting and playing a preexisting riff that Johnson did not create. A "riff of his own" seems susceptible to either interpretation in this context. The issue—what, if anything, did Johnson originate?—arose in more detail as Berry continued to describe how the songs were created.

A. ... I can say this: Mostly all songs, all of my songs, I don't know about other people, began with what I strum with the guitar, just a strum, chord for chord for chord as the changes go, and along with the lyrics that I'm singing with it, so this is a good progression, I mean, manner in which a song travels in changing chords and so forth. I'm singing the melody along with this, and as I introduced the songs to the musicians at a session or wherever it is, a jam session behind any auditorium, I will play that and sing that, you know, they get an idea of how the song progresses, and then, now I'm away from whatever your question was, but that's the way it started.

Q. Well, you were talking about how the songs generally progress?

A. Yeah, that's the beginning of it for sure.

Q. Do you recall ever bringing to Johnnie Johnson or Ebby [sic] Hardy, a completed song, ready for recording?

A. There is no such thing.

Q. Let me take off the last part then. Did you ever bring them what you considered a virtually complete song?

A. No, because I didn’t know how they would play it, you know, it’s not complete until
the other instruments get into the song.

Q. You needed their input in order to get to complete?

A. I need to show them what the song is, and the song is not a song, is not the song
then. As they put in whatever their style is, you know, it may be, it may fit the song
that I’m looking for or not. As I change or direct what fill-in, as I mentioned awhile ago,
it is, they already adhere to what the fill-in is and they will play whatever they play. If
that’s good for the song, it goes into the song, eventually we’ll have the entire song
compiled and we’ll try and record it. And even after we start recording it, the entire
song, we should put in another chorus in here, I might write another lyrics or we should
put, not make this change, make it a chorus—I’m sorry—a refrain. A refrain is the
portion of a song that’s different than the first verse and the last verse, and so it
progresses like that, you know; but it’s got to be some director, there has got to be
somebody who coordinates . . .

As with much of Berry’s testimony, there are several important
ccepts to unpack. Berry initially seems to have made a key
cession: he never brought a completed song, not even a virtually
pleted song, to Johnson. Berry, though, quickly complicated the
issue with his remark that he “need[ed] to show them what the song
is, and the song is not a song, is not the song then.” What does this
mean? Perhaps the best reading is that Berry was attempting to
distinguish between the essential elements of a song—which he had
created by himself—and the fully arranged song that was ultimately
recorded. But “the song is not a song, is not the song then” definitely
blurs the difference between the creation of a song and the recording
of an already-created song.

If Berry believed, at least with respect to his songs, that there
is no difference, and that other musicians’ performances are essential
to create a “final” song, how then could he consider himself their sole author? The answer may well lie in how he described the creative process. Instead of saying “they play their parts and we all decide what works best,” Berry said, “[a]s I change or direct” and “it’s got to be some director, there has got to be somebody who coordinates.” Berry saw himself as the leader, director, and coordinator of how the music was created, and, to him, these roles were synonymous with composer—sole composer—of the music.

4. Berry: Band Leader, Director

At this point in his testimony, Berry, professing to try to lighten the mood (and making light of the fact that he almost, accidentally, used the word “collaborate” when describing how the songs were created) interjected with a story about a time when the Internal Revenue Service was investigating his tax returns. Berry accidentally told an IRS agent that he did something to “evade his taxes,” whereupon the agent said, “you mean ‘shelter’ don’t you, Mr. Berry?” After the laughter died down, Johnson’s attorney continued:

Q. . . . [B]efore we went off on that story, you talked about, I think the word you were using was “director”, that you were the “director”?
A. On all the songs, yeah.

Q. And as the director, you would put out the roots of the song, the beginning, and then Ebby [sic] and Johnnie Johnson would come in and play their style, their fill-in, their riffs, and you would work off each other, and eventually you get to the studio and have a song?

A. No. It’s true up to where you said, “and they would come in”. No, they would be there listening to what I had showed them, and they would play. Ebby [sic] would play the beat, because I could strum the beat on the guitar, you know, if it was (indicating) or either (indicating), you can hear the difference in (indicating). A beat is a syncopation that the song, that a song carries, and that’s easy, because you can slap that off with the hand, but the melody, you have to strum it with chords, the progression. The melody, you sing or play with one note, any musician in Johnnie’s caliber, could play what they hear you play, because they know what key you’re in.

Q. So, you think that anybody could have just come in and done what Johnnie Johnson did, any good piano player?

112. When Berry, at the end of the last excerpted portion of his testimony, said “there has got to be somebody who coordinates,” he stumbled, remarking: “oh, oh, I thought I said ‘collaborate,’ sorry.” Deposition of Charles E. Berry Volume I, supra note 19, at 118:10–118:11.

113. Id. at 118:13–118:21.
A. Yes, but not with his style, nobody could play exactly like Johnnie Johnson, no, no, and Johnnie Johnson played, his style was what I liked and that's the reason why we were together so long, producing, not producing, delivering music.\textsuperscript{114}

Here, Berry indicated that what the other musicians played, after Berry introduced them to the roots of the song, merely followed or flowed from what Berry already had composed. And if Berry had already developed the song’s full melody, then it would be difficult to argue with his thinking. In other words, if Berry brought Johnson a complete melody to a song and then asked Johnson to fill in his piano part based on that melody, then Berry would likely be considered—by both musicians and the courts—that song’s sole author.\textsuperscript{115}

5. Melody, Origination, and Nothing New Under the Sun

So did Berry ever bring a complete melody to Johnson?

Q. . . . I'm trying to figure out whether you ever approached Johnnie with a complete set of lyrics to a song, and what you considered the complete guitar melody or guitar part to a song?

A. I can say yes, and then I can say no. Yes, in the sense that I knew how I wanted the song; no, in the sense that I did not know if he could play what I wanted, or anybody could play what I wanted, you know.

Q. Did Johnnie always contribute to the song what you wanted and not what he thought belonged?

A. I don’t know, see, I don’t know what Johnnie thinks, but we finalized it with what I wanted, yes, he played what I wanted.

Q. Were there times when he played something that you just thought was fantastic and it was something you hadn’t thought of?

A. How can I say this? No.

Q. Never once?

A. I don’t think so, no, because what he played after I heard him, see, don’t forget now, I’ve heard him play, what, three years before we ever started recording, and I could point out, you know, Johnnie play this, and in fact, I would construct a song that that riff would fit in, and I would tell him to play da-da-da-da-da-da or blah-blah, whatever we called the riff, or the change, or whatever it might be and Johnnie got big ear, that’s what we call musicians who can play what they hear, you know, so he did.

Q. So, he would play that riff, you would say, Johnnie play riff No. 2, or whatever you guys called it?

A. Yeah; yeah.

Q. And that was a riff that he brought to the group, or was it your riff?

\textsuperscript{114} Id. at 118:22–120:2. Where the transcript says “indicating” here, Berry is slapping his hand on the chair and table to demonstrate different rhythmic beats. Video of the Deposition of Charles E. Berry, supra note 103, at 2:44:02–2:44:30 PM.

\textsuperscript{115} See supra notes 22, 26–29 and accompanying text.
A. That’s what I’m saying, yeah, it was something that was in my head and I told him to play it, you know.

Q. So, every time you told him to play a riff, it was never anything that he had written himself?

A. Now, you’re saying “every time”.

. . . .

A. When you say “every”, I have to say, you know, I don’t know whether it’s every time.

Q. So there were some times in some of the songs that Johnnie Johnson’s riff appears and it’s his creation?

MR. GREEN [Berry’s attorney]: I’m objecting, that’s been asked and answered.

THE WITNESS: Yeah, I don’t even understand the question.

Q. . . . Let me ask it a different way if you don’t understand it . . . .

A. Okay.

. . . .

Q. What I’m wondering is, do you believe that there are some times when you asked Johnnie to play a riff and it was a riff that he created, not one that you created?

A. That’s untrue, because I believe there is nothing under the sun that hasn’t been played, and now, with the years that I have, there is nothing, there is no riff under the sun that Johnnie has not heard or I have not heard; so, you play, it might come out and it belongs to someone else, you take the chance that it doesn’t, and you go ahead and you record it; so, and here’s where your question comes in, if it sounds good and meets what you wanted on the song or is equal to what you wanted in the song, let it go, it’s a song, you don’t know whether it will be a hit or not, so it goes, and nobody is writing it down saying, “I own this,” and, “I own this,” or “This will be good for the song as a copyright,” or anything, nobody knows that until after the song is played out there in the world.116

We see Berry’s uncertainty—“I can say yes, and then I can say no”—when pressed on the state of the songs at the time they were brought to Johnson. Berry knew what he wanted done in order to complete the song but, at first, claimed he did not know if Johnson could play what he wanted. Berry then proceeded to explain how well he did know, from their three-year relationship at the Cosmo Club, what Johnson could contribute to a song.

Was that contribution something Johnson had created? Was it ever Johnson’s riff that Berry wanted in the song? Berry answered these questions in perhaps the best way an artist honest with art itself can answer: no, nothing he or Johnson ever played could be claimed by them, in isolation, to be truly original. Once combined, though, these separate strands may together make a new song, maybe a hit, maybe history.

6. A Round-About Sense: Did Johnson Help Create the Songs?

So who gets credit for it?

Q. Do you believe as you sit here today, that Johnnie Johnson had any, played any part in creating the songs that we’ve said he did?

A. In a round-about sense, I suppose he did. I don’t know, but I suppose he did; but in a legal sense, no, because I consider myself having written any songs that is out now with Chuck Berry on it, because that’s the way it went. I composed it and I did it. And the way, the round-about way, there is no way that I could have told Johnnie to play what I didn’t know he could play, until I heard it. If he can play that, I hire him to play that and he better play, I paid him for it, and he’ll play it and I’m satisfied, because what I heard I liked and I wanted it in that song, I paid him to play it and he would play it and it becomes the song, and then it goes out.

Now, if it adds to the song, Johnnie—I won’t say that, Johnnie wouldn’t ask me for more money, but I would share, but his song or his input that I asked him for carries the song out, and I would pay him more money, darn right, because, but I wouldn’t give him the song, but I would pay him more money for that production, for that deliverance, because it did both of us good.

Q. Did that ever happen?

A. I never knew a song where Johnnie was the major factor in the song, you know. You know, since I consider the lyrics, some of the lyrics in my songs is the whole song, especially like “Johnny B. Goode”, most of my songs are just boogie, but lyrics, I guess, carried them through, “No Money Down”, “Roll Over Beethoven”, I know Beethoven had, but I think the lyrics of my songs kind of pushed them more so than the music, because I’m playing just boogie-woogie, like Count Bassie [sic], Lionel Hampton, Tommy Dorsey, those are the people that drove me to playing, you know. 117

“I paid him to play it and he would play it and it becomes the song,” said Berry. Did Berry own Johnson’s contributions because, as he claimed, he paid for them? We delve into that question in the next section of this Article, but it suffices to say now that the answer is not nearly as clear as Berry would like it to be. What is clear is that Berry saw himself as the songs’ sole author regardless, even if in a “round-about sense” Johnson had contributed something to their creation. But Johnson’s contributions, to Berry, at least as he looked back, were never a major factor. Why? To Berry the lyrics were the driving force, so to their author goes the credit for the whole song.

This provides us with an appropriately ambiguous stopping point. Is it words or music that drives a song, or is it both? Berry’s lyrics were unquestionably groundbreaking, but as simple poetry, divorced from the music, would they have had the same impact? “In rock as a whole, there’s been many great songs which have had really appalling lyrics, but there have been no great songs which have had appalling music,” musician and songwriter Peter Gabriel has

117. Id. at 149:10–150:20.
observed.\footnote{2014 Rock and Roll Hall of Fame Induction Ceremony (HBO television broadcast May 31, 2014) (incorporating a quote originally shown in The South Bank Show: Peter Gabriel (ITV television broadcast Oct. 31, 1983)). Delving deeper into the subject, Pete Townshend has said:}

I think it’s safe to say that the greatest examples of Berry and Johnson’s recordings, like “Maybellene,” “Roll Over Beethoven,” and “Rock and Roll Music,” would not have had the same popularity, reach, or influence had it not been for great lyrics and music, which achieved much more together than they would have apart.

We proceed, then, to consider whether Johnson helped create this music and thus the songs, what copyright law has to say about it, and what we think the law should say.

IV. WHAT LESSONS DOES JOHNSON V. BERRY HAVE FOR COPYRIGHT LAW?

Johnson v. Berry, particularly the testimony quoted above, touches on issues that cut across copyright law and how it evaluates artistic creation. From where does creativity spring? What drives creativity: adapting preexisting works or original expression? And what does it mean to be original or unique? How can we, if at all, separate collaborative contributions to creative works? These concepts are too broad to cover here completely, but the specific focus of this Article—what this case can tell us about joint authorship—explores many of these issues and provides a valuable tool with which to analyze the invaluable resource of Berry’s and Johnson’s testimony.

\footnote{Bill Flanagan, Written in My Soul: Conversations with Rock’s Great Songwriters 200 (1987). Berry and Johnson both come directly from this African-American, slavery-descended tradition. See Berry, supra note 108, at xvii; Fitzpatrick, supra note 3, at 13–21. For further biographical information on Berry and Johnson, see John Collins, Chuck Berry (2002), Howard A. DeWitt, Chuck Berry: Rock ’N’ Roll Music (2d ed. 1985), Krista Reese, Chuck Berry: Mr. Rock N’ Roll (1982), and A Profile of Johnnie Johnson (PBS television broadcast 2005), available at https://www.youtube.com/watch?v=E1n8Bh8lsJQ. A feature-length documentary on Johnnie Johnson is also currently being produced by St. Louis television journalist Art Holliday. See Johnnie Be Good: The Movie, supra note 58.}

Berry and Johnson are most certainly a vital ring in this beautiful tree, as Townshend called it, grown from slavery’s sour ground.
A. Initial Issue: Were Johnson’s Contributions “Works for Hire”?

The first legal issue, before we proceed to joint authorship, is whether Johnson’s contributions were “works for hire.” Chuck Berry referred several times in his testimony to how he “hired” Johnnie Johnson to play piano on the songs. In so doing, Berry raised the specter of “work for hire,” a doctrine which automatically vests an employer with ownership of the copyright in an employee-created work. Unsurprisingly, Berry’s legal team asserted the doctrine as a second-line defense to Johnson’s joint authorship claim; the idea being that if a jury decided Berry was not the sole creative contributor to the songs, he should still win the case because Johnson’s contributions were created exclusively as Berry’s employee.

What of this defense? If successful, it could be said to make the joint authorship issue moot. For example, even if Johnson had created all of the music to Berry’s songs, if he did it for Berry as a work for hire, copyright law would deem Berry the songs’ sole author.

It makes sense, then, that we should address this issue before delving too deeply into the details of joint authorship law. The current Copyright Act defines a work for hire in relevant part, “as a work prepared by an employee within the scope of his or her employment.” Because the songs at issue were created prior to the present Act’s passage, however, the previously governing copyright law—the Copyright Act of 1909—almost assuredly applied to Johnson’s claims and Berry’s defenses thereto. Federal courts applying the 1909 Act have examined whether a traditional employer-employee relationship existed, but they have often focused more on whether the purported employer had “control” over the work.

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119. It does this by deeming the employer the author of the work. See 1 NIMMER & NIMMER, supra note 19, § 5.03[A].
120. See Defendant’s Trial Brief at 8, Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002) (No. 4:00CV1891).
122. See 1 NIMMER & NIMMER, supra note 19, Overview, § 1.11 (discussing that the law in effect at the time a cause of action arose—here the 1909 Act—is in all likelihood the applicable law, but noting that the 1976 Act does not expressly bar its retroactive application). Retroactive application that causes a transfer in copyright ownership, as Johnson’s claim here aimed to do—transferring 50 percent to Johnson—would however raise constitutional issues, such as the Fifth Amendment’s Takings Clause, and likely because of this, “courts have generally construed the [1976 Act] to avoid such retroactivity.” Id. § 1.11.
123. 1 NIMMER & NIMMER, supra note 19, § 5.03[B]. The work-for-hire doctrine, particularly as it applied under the Copyright Act of 1909, was recently headed toward a possibly defining US Supreme Court ruling until, on the eve of the Court’s decision on whether to take the case, the parties—Marvel Entertainment and the estate of Jack Kirby, co-creator of many of Marvel’s iconic characters like Spider Man, the Hulk, and Iron Man—settled. See Marvel
Berry certainly had a case to make under this work-for-hire theory. He testified that the band members, including Johnson, were paid for the recording sessions from the money Chess Records paid Berry under his Chess contract.\textsuperscript{124} Berry called himself the band’s leader and director.\textsuperscript{125} And Johnson himself acknowledged that the ultimate decision of what went into a given song belonged to Berry.\textsuperscript{126} Further, federal case law has, in other contexts, referred to band members as the employees of bandleaders.\textsuperscript{127}

But this argument was far from conclusive. Johnson testified that during the time he was recording with Berry, he held regular employment as a steel chipper in several foundries and he would take approved leaves of absence to join Berry for recording sessions or tours, weighing against a view that he was regularly employed by Berry.\textsuperscript{128} Johnson also testified that Leonard Chess paid him directly, and recording session contracts in the case file refer to Berry \textit{and his band} as employees of Chess.\textsuperscript{129} Perhaps most compellingly, Johnson testified, and Berry several times tacitly admitted, that a number of the songs began during their time playing at the Cosmo Club, and for a period of time there Johnson was the bandleader.\textsuperscript{130}

But what about control of the songs? Here, Berry’s testimony again cut against “work for hire.” Berry stated several times his belief that a song is not finalized until recorded.\textsuperscript{131} He also testified that Chess effectively had the final say over the recordings. For example:

\begin{itemize}
\item \textsuperscript{124}See Deposition of Charles E. Berry Volume II, supra note 11, at 213:12–214.
\item \textsuperscript{125}See supra notes 109–110, 114 and accompanying text.
\item \textsuperscript{126}See supra note 65 and accompanying text.
\item \textsuperscript{129}See Deposition of Johnnie Johnson Volume I, supra note 49, at 111:20–111:24; \textit{e.g.}, Recording Session Contract Between Aristocrat Records Corp. and Chuck Berry (Apr. 19, 1956) (on file with the author) (“On behalf of the employer the Leader will distribute the amount received from the employer to the employees.”). Berry, as noted above, claimed that the band was paid out of his money, but Berry’s work-for-hire defense would certainly have been stronger had he paid the band members directly. See supra notes 124–27 and accompanying text.
\item \textsuperscript{130}See supra notes 3–4, 64, 68, 99, 104 and accompanying text.
\item \textsuperscript{131}See supra notes 104–07 and accompanying text.
\end{itemize}
Q. Did Mr. Chess on occasion decide that he didn’t like, for instance, the piano, so he would remove that from a song?

A. His glory and my privilege, because I wanted to record. I had the inspiration that, I guess, any youngster would have, as long as you record me, I’ll do what you say, I’ll record anything, you know.

Q. So, the answer is yes, he did that on occasion?

A. On many occasions, yes.\(^\text{132}\)

So, without paying Johnson a regular salary or wage or paying him directly for the recording sessions, and lacking final control over the songs themselves, or at least what he considered to be the songs, Berry’s argument that Johnson’s contributions were works for hire would likely have failed to win over judge or jury. Johnson, moreover, could have compellingly counter-argued that many of his contributions to the songs (as well as Berry’s!) were initially conceived when Berry worked for him, not the other way around.

The reality, of course, is that we do not know how this defense would have turned out; given this uncertainty, the joint authorship question is still very much alive. And even if one believes that a jury or appellate court would have found in Berry’s favor on the work-for-hire issue, it does not erase the value we gain from analyzing the two men’s testimony through the lens of joint authorship. A victory for Berry on this ground would not have resolved the underlying factual question of whether Johnson’s input helped create the songs versus merely adding to their performance. Such a victory certainly would have made Berry the legal owner of that input, but at the same time it could have seriously damaged his independent auteur persona and altered how we look back upon these bedrock compositions.

This is why Berry was unlikely to lead with this defense in front of a jury and, in fact, did not lead with it in his trial brief filed with the judge.\(^\text{133}\) Berry was first and foremost interested in establishing that he was the songs’ sole author, whether Johnson was his employee or not. This is also why, regardless of a work-for-hire defense and what one thinks of its merits, the joint authorship question was and still is the heart of the case.

\textit{B. Joint Authorship and Johnnie Johnson: New Light on Persistent Problems}

The testimony from \textit{Johnson v. Berry} provides a unique tool with which to analyze the good, the bad, and the ugly of copyright
law’s existing joint authorship tests, ultimately suggesting that a change is necessary. As discussed above, courts have predominantly applied two tests to determine joint authorship. The first, the Childress test, requires essentially that a joint author (1) intend to be considered a joint author and (2) make an independently copyrightable contribution to the work. The second, the mastermind test, requires a court to evaluate a joint authorship claim using three criteria: (1) a joint author must have exercised control over the work; (2) the claimed joint authors objectively manifested an intent to be joint authors; and (3) the audience appeal of the work turns on each claimed joint author’s contribution, such that the share of each contribution in the work’s success cannot be appraised.

Applying these tests here, I think Johnson would have been found, as a matter of law, not to be a joint author, even if we fully believe every aspect of his testimony. I view this as a fundamentally incorrect result: not incorrect because it says that Johnson did not jointly author the songs—that to me is, or at least should be, a close case—but incorrect rather in that our copyright law would prevent him, or an artist like him, from even having a chance to establish joint authorship. There are several reasons why I take this view.

1. Self-Regard as an Author is a Poor Indicator of Joint Authorship

First, I believe Johnson v. Berry demonstrates that self-regard as an author is a poor indicator of joint authorship. Via the element of “intent,” both the Childress and mastermind tests examine whether all of the purported joint authors intended each other to be deemed joint authors. The testimony of Johnson and Berry, however, shows that significant contributions may be made to a creative work by someone who is not considered, and does not consider himself, to be a joint author.

Why is intent an issue in the first place? Intent has become a focus in the joint authorship analysis, and thus an element of the Childress and mastermind tests, because the Copyright Act uses the word “intention” in its definition of “joint work,” i.e., “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” There is, however, significant disagreement among legal commentators as to what the term “intention” really means in this context.

134. See supra note 39 and accompanying text.
135. See supra note 40 and accompanying text.
Some read it as simply requiring that two or more authors intend to merge their respective contributions into one work. In other words, “intention” here distinguishes joint authorship from situations where a second person, unbeknownst to or without the permission of the author, adds something to the author’s work, since the author did not intend to merge his or her work with the second person’s. “Intent to merge,” then, is the definition these commentators adopt.

Others read more into the term “intention.” They believe it means that each of the two or more authors actually regards himself or herself as an author. That is, each “intends” to be considered an author and intends that the other one, or more, will be considered authors of the work as well. To these commentators, authorship means something more than merely contributing to a work: it connotes an intention to be considered by the world as the one (or one of the ones) who created the work.

Courts, as reflected in both the Childress and mastermind tests, have largely adopted this second reading of “intention.” Accordingly, when applying Childress, if two contributors do not regard each other as authors to a work, the first element of the test is not met, and the work is not “joint.” Similarly, under the mastermind test, an “objective manifestation” of intent to be deemed joint authors is one of only three factors a court must consider in deciding if a work is jointly authored. So if there is no evidence of such intent, or even if there is evidence of the respective authors’ subjective intent, this factor will weigh against a finding of joint authorship.

Here, the Childress test would almost surely block Johnson from consideration as a joint author. Berry steadfastly testified that he considered himself to be the one and only author of his songs, both


138. See 1 NIMMER & NIMMER, supra note 19, § 6.03.

139. See Lape, supra note 137, at 57.

140. See, e.g., Childress v. Taylor, 945 F.2d 500, 507–09 (2d Cir. 1991); VerSteeg, supra note 43, at 144–45.

141. See, e.g., VerSteeg, supra note 43, at 144–45.

142. See LaFrance, supra note 42, at 226–27 (“The Childress approach has been endorsed in virtually every subsequent adjudication of a joint authorship dispute.”).

143. So, for example, testimony by one contributor that she viewed herself as an author and did not consider another contributor to be an author would be seen as purely subjective, and a court applying the mastermind test would not, or at least should not, give it any weight. See Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000).
at the time they were created and today.\textsuperscript{144} Johnson similarly admitted that at the time the songs were created he did not consider himself their joint author.\textsuperscript{145} This testimony would start and end the inquiry under \textit{Childress}\textemdash the songs are not joint works and Johnson did not jointly author them.

We can reach this result even more easily when applying the intent factor of the mastermind test. Not only were there no objective manifestations that the two men intended at the time of creation to be joint authors, there was a key objective manifestation to the contrary. Berry was billed on the records as having written the songs, and Johnson was not.\textsuperscript{146} Again, at least on this factor, case closed.

But should it be? If we believe Johnson’s testimony\textemdash that he contributed melodic and harmonic expression to complete the songs\textemdash should he be blocked from joint authorship because he did not consider himself to be, at the time the songs were created, an author? I say no. Berry and Johnson both intended to merge their musical contributions into an inseparable whole. That should be the end of the intent analysis, particularly where someone like Johnson did not understand that his or her contributions could constitute authorship. Whether or not Johnson’s contributions otherwise qualify him for joint authorship, intent should not disqualify him from it.

\textit{Childress} proponents simply do not believe that we should vest someone with author status who does not see himself as one.\textsuperscript{147} But authorship should not revolve around self-conception, it should center on the nature of the contribution. In other words, do we as a society believe that a person contributed to a work in such a way that we deem him or her one of its authors, entitled to the fruits of its creation? The Constitution allows Congress to “secur[e] for limited Times to Authors \ldots the exclusive Right to their respective Writings \ldots”\textsuperscript{148} This clause empowers us, acting through our elected representatives, to determine who these authors are and reward them; the Constitution does not have us ask whether individuals have

\begin{flushright}
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\item See Deposition of Charles E. Berry Volume I, \textit{supra} note 19, at 149:10–150:20 (“I consider myself having written any songs that is out now with Chuck Berry on it, because that’s the way it went, I composed it and I did it.”).
\item See \textit{supra} notes 75–77 and accompanying text.
\item See \textit{Childress} v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991) (“What distinguishes the writer-editor relationship and the writer-researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.”).
\item U.S. CONST. art. I, § 8, cl. 8.
\end{enumerate}
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self-determined that they are authors and thus believe that they are entitled to the resulting rewards.149

Assuming then, for sake of argument, that Johnson meets the other requirements of joint authorship, should a man who helped create such culturally significant and influential work be barred from recognition as a joint author because he did not regard himself as one? No. In this respect, at least, the Ninth Circuit’s mastermind test improves on Childress, since intent to be deemed an author is just one factor, rather than a prerequisite. Still, by making it one among only three factors, the mastermind test overemphasizes the importance of authorial self-regard, creating situations where it could dictate the result with judge or jury.150

A final word on intent: some might argue that Johnson’s ignorance of authorship, combined with the significance of his contributions, was an anomaly or, at the least, a product of the times. Today, with improved access to information on copyright, better legal and business representation, and an increased societal respect for artists’ rights, an aspiring creator is more likely to grasp the concept of authorship. And perhaps this is true with respect to artists who get record contracts and go into recording studios. But the new wave of musical creation is regularly happening outside the studio.151 Today’s online forums like YouTube and Facebook greatly increase the chance that people will be creating, together, copyrightable expression without being aware that is what they are doing.

Consider a brief hypothetical example: two children create a new song based on an old public domain work, “Oh Susanna,” with one

149. Unlike many provisions in the Constitution, James Madison did not mention this clause in his notes, and it was barely mentioned in The Federalist Papers. See 1 NIMMER & NIMMER, supra note 19, § 1.02; WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE § 1, available at http://digital-law-online.info/patry/patry4.html; see also SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS, THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 22 (2003). Vaidhyanathan argues well that the clause was put in the Constitution as an economic motivator, not a preexisting moral right. See id. at 21.

150. The recent high-profile case of Garcia v. Google is a telling example. There the Ninth Circuit cited only to intent and authorial self-regard in finding a lack of joint authorship, ignoring the mastermind test’s other two factors. See Garcia v. Google, Inc., 766 F.3d 929, 933 (9th Cir. 2014), en banc reh’g granted, 771 F.3d 647 (9th Cir. 2014). For a more detailed discussion of the case, see infra notes 236–51 and accompanying text.

151. BYRNE, supra note 22, at 213 (“[N]ow an album can be made on the same laptop you use to check email.”); David Byrne, How Will the Wolf Survive: Can Musicians Make a Living in the Streaming Era?, DAVID BYRNE (Mar. 31, 2014), http://davidbyrne.com/how-will-the-wolf-survive-can-musicians-make-a-living-in-the-streaming-era (“There has been a flowering of creativity and possibility somewhat thanks to the web . . . . There’s so much weird and wonderful music out there; as a music fan, it’s exciting. In recent years you occasionally see what would have once been fringe artists, formerly with miniscule audiences, now reaching sizable numbers of fans . . . .”); PRESSPAUSEPLAY (House of Radon 2011) (documentary film discussing the opportunities offered by digital, online creativity).
on guitar and one on vocals, using a smartphone to record their spontaneous creation and live performance of the song. They then post the video online and it becomes an Internet sensation. One or perhaps both are entirely ignorant that what they have just done constitutes authorship of a new copyrightable song. Or the singer may understand the concept, and she was the one who started the melody of the song, but the guitar player helped complete the melody. Asked on an online forum whether she helped create the song, the guitarist says no, she simply played her guitar on it. Johnson v. Berry teaches us that we should be wary to disqualify the guitarist from joint authorship of the song simply because she did not understand what she was doing.

Some might also say that copyright exists to incentivize creation, and artists like Johnson or the child-guitarist are already creating without this incentive—i.e., they are ignorant of copyright or think they are outside its protections—so we needn’t worry, they will create anyway. In fact, some question whether copyright truly motivates creation at all. But what would Johnson have done if he had obtained credit and reward as a joint author of the Berry canon? Might he have composed music more often? Perhaps not, because, unlike Berry, he seemed less motivated by the greater financial possibilities that songwriting could offer, and for many years he struggled mightily with alcoholism, likely dampening his creative ambition. But perhaps so, because starting in 1987, around the

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153. Similar hypotheticals can be formulated for different media: an artist who has drawn the visualization of a character in an illustrated novel may not understand that she’s helped create the character, a software programmer contributing a program essential to the creation of a video game may not realize that she’s helped create the audiovisual work that is the video game, or an actor in a play who improvises 90 percent of her dialogue might not think that she’s helped create the play. This should not disqualify them from joint authorship.

154. See, e.g., Lydia Pallas Loren, The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection, 69 LA. L. REV. 1, 11–12 (2008) (“Works in which the intrinsic dimension of creativity is high also do not, under the utilitarian story of copyright, need the marketable right granted by copyright to induce their creation.”); see also Jeanne C. Fromer, Expressive Incentives in Intellectual Property, 98 VA. L. REV. 1745 (2012) (summarizing well the utilitarian underpinnings of US copyright law).


156. In his autobiography, Berry recalled: “[W]hen I learned, upon entering a recording contract, that original songs written by a person were copyrighted and had various rewards for
time he became aware of songwriting's monetary rewards, Johnson began recording his own albums, creating songs, and even singing on them up until his death in 2005.\textsuperscript{157}

The truth is we will never know whether Johnson would have created additional music had he received credit and compensation for songwriting earlier. Nor can we know for sure the extent that any particular artist is motivated by copyright. So the point, I think, is that as long as we have copyright ownership, at least in its present form, we should strive to improve its fairness and better tie it to the actual workings of the creative process. Removing authorial self-regard as a requirement for joint authorship would be an important step in this direction.

2. Independent Copyrightability is a False Bar to Joint Authorship

Compare two quotes:

I believe there is nothing under the sun that hasn't been played, and now, with the years that I have, there is nothing, there is no riff under the sun that Johnnie has not heard or I have not heard; so, you play, it might come out and it belongs to someone else, you take the chance that it doesn't, and you go ahead and you record it... if it sounds good and meets what you wanted on the song or is equal to what you wanted in the song, let it go, it's a song, you don't know whether it will be a hit or not, so it goes, and nobody is writing it down saying, "I own this," and, "I own this," or "This will be good for the song as a copyright," or anything, nobody knows that until after the song is played out there in the world.

and

In truth, in literature, in science and in art, there are, and can be, few, if any, things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before... If no book could be the subject of copyright which

the composer, I welcomed the legal arrangement of the music business. I enjoyed creating songs of my own and was pleased to learn I could have some return from the effort.” \textsuperscript{157} BERRY, supra note 108, at 143. Regarding Johnson’s problems with alcohol, see FITZPATRICK, supra note 3, at 40–41, 126–27, 174–75, 216–21 (“You ever drink?” [Johnson asked, continuing] ‘Don’t ever start. Life will run right by you when you drinkin’. Or should I say, when you let drinkin’ run your life.”).

157. Most but not all of these albums were recorded after he gave up alcohol in the late 1980s and early ’90s. FITZPATRICK, supra note 3, at 288–92; 2 REFF, supra note 98, at 909–13 (listing Johnson’s solo discography). Additionally, while Berry was being prosecuted and then imprisoned under the Mann Act in the late 1950s and early ’60s, Johnson played piano in blues legend Albert King’s band, performing on several significant early King recordings, like “I Get Evil” and “I Walked All Night Long.” PEGG, supra note 3, at 119–64 (recounting the saga of Berry’s Mann Act trials and imprisonment); 2 REFF, supra note 98, at 874–75 (detailing Johnson’s recording work with King). Johnson does not appear to have directly claimed any authorship in the songs he recorded as a member of King’s group, but when asked in a 1999 interview, “Did you write or make-up songs with Albert King the same way you did with Chuck Berry?,” Johnson replied, “Well I was on some of his records and I provided some of the background for some of his blues he was singing, yeah. I helped him a lot in that.” Ken Burke, Father of Rock & Roll: The Johnnie Johnson / Travis Fitzpatrick Interview (Sept. 30, 1999), http://www.rockabillyhall.com/DrlJJJohnson.html.
was not new and original in the elements of which it is composed, there could be no
ground for any copyright in modern times, and we would be obliged to ascend very high,
even in antiquity, to find a work entitled to such eminence. Virgil borrowed much from
Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all
the known learning of his profession; and even Shakespeare and Milton . . . would be found
to have gathered much from the abundant stores of current knowledge and classical
studies in their days . . . . In truth every author of a book has a copyright in the plan,
arrangement and combination of his materials, and in his mode of illustrating his
subject, if it be new and original in its substance.

The first is from Chuck Berry, excerpted from his deposition testimony
above. 158 The second is from former US Supreme Court Justice Joseph
Story. 159 Though one was discussing music and the other literature,
they each expressed nearly the same thought, stated most directly by
Berry, that “there is nothing new under the sun.” If we really only
granted copyrights to entirely new (i.e., “original”) works of art,
nothing would qualify. Instead, we implicitly understand that
copyright captures how an author plans, arranges, and combines
previous ideas and influences, adding his own creative spark
somewhere into the mix, so that as a whole, he or she forms
expression sufficiently different than what came before. 160 Why then,

159. 1 NIMMER & NIMMER, supra note 19, § 3.01 (quoting Emerson v. Davies, 8 F. Cas.
615 (C.C.D. Mass. 1845)).
160. Creativity through copying has not only been prevalent in rock and roll and
particularly in the blues, rock’s main antecedent, but throughout music history. See generally
Arewa, supra note 28 (discussing classical composers Handel, Bach, and Mozart’s often extensive
use of preexisting works in their compositions). For a particularly relevant example, we can look
to John Lennon—widely hailed as one of modern music’s greatest songwriters—and his alleged
copying of one of the songs at issue in Johnson v. Berry: “You Can’t Catch Me.” See supra note 11
and accompanying text. Lennon apparently remarked in an interview during the 1970s that the
Beatles “Come Together” was influenced by the song. The BEATLES, supra note 106, at 339. A
music industry figure named Morris Levy owned at that time (through his company Big Seven
Music) the publishing rights to “You Can’t Catch Me,” and he sued Lennon for copyright
infringement. See Big Seven Music Corp. v. Lennon, 554 F.2d 504 (2d Cir. 1977). The case
settled, with the parties apparently striking a deal that Lennon as a solo artist would record
“You Can’t Catch Me” along with two other Levy-owned compositions, such that Levy would
receive royalties resulting from Lennon’s record sales. See Peter Doggett, You Never Give Me
Your Money: The Beatles After The Breakup 210, 223, 230–31 (2009); Joseph C. Self,
lenlevy.htm. Unlike the dispute with the Beach Boys over “Surfin’ U.S.A.,” Berry did not get a
songwriting credit on “Come Together” as part of the settlement. See supra note 11 and
accompanying text.

Regarding the creation of “Come Together,” Paul McCartney recalled: “John came in
with an up-tempo song that sounded exactly like Chuck Berry’s ‘You Can’t Catch Me’,
even down to the ‘flat-top’ lyric. I said, ‘Let’s slow it down with a swampy bass-and-drums vibe.’
I came up with a bass line and it all flowed from there.” The BEATLES, supra note 106, at 339.
Lennon for his part claimed that “Come Together” was written only “obscurely around an old Chuck Berry
thing. I left the line in: ‘Here comes old flat-top. ’ It is nothing like the Chuck Berry song, but they
took me to court because I admitted the influence once years ago. I could have changed it to:
‘Here comes old iron-face,’ but the song remains independent of Chuck Berry or anyone else on
earth.” Id.
when two or more people contribute to this process, do we cut so many of them out of the picture?

First, how do we cut them out? We do so by insisting, under both the Childress and mastermind tests, that each “joint author” must make an “independently copyrightable” contribution to a work in order to qualify as a joint author. A key requirement of independently copyrightable expression is originality.⁶¹ If we wished, though, we could take both Berry’s and Johnson’s testimony, listen to the songs, and dissect each piece of each song, determining which previous song or riff provided the template for it, until we could convincingly argue that neither man, alone, contributed anything truly original.⁶²

Collaborative creation is rarely, if ever, a one-plus-one-equals-two proposition, as exemplified by Berry and Johnson’s process. To borrow a line from another prominent rock artist, “one and one don’t make two, one and one make one.”⁶³ This “one and one make one” creative harmony is exactly what Berry and Johnson described in their testimony. Every time either attorney tried too hard to separate Berry’s and Johnson’s respective contributions to the music, each man brought it back to the same overarching principle: you cannot truly separate the interplay of guitar, vocals, and piano that drove the songs. As Berry explained:

[T]here was a harmonious understanding after a few recordings, that when I stop singing, Johnnie played this riff, or that riff, or that riff, and there are certain ones that

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Elsewhere, though, Lennon admitted how integral copying was to his creative process: “Especially in the early years [I] would often write a melody, a lyric in my head to some other song because I can’t write music, so I would carry it around as somebody else’s song and then change it when I got to putting it down on paper or putting it down on tape, consciously change it, because I knew somebody’s going to sue me or everybody’s gonna say what a rip off.” The South Bank Show: John Lennon’s Jukebox (ITV television broadcast Mar. 14, 2004), available at https://www.youtube.com/watch?v=rONf4gytiZQ.

In a surely intentional irony, Lennon’s settlement-induced recording of “You Can’t Catch Me” was done in the swampy bass-and-drums style of “Come Together.” See JOHN LENNON, You Can’t Catch Me, on ROCK ‘N’ ROLL (Apple Records 1975), available at https://www.youtube.com/watch?v=B8g70Pzfq0.

161. Zemer, supra note 42, at 614 n.19 (“The far-reaching implications of the Childress decision include consequences on the general definition of copyright. For example, the Ninth Circuit, following the Childress test, stressed that originality should be interpreted stringently when the notion of independent copyrightable contribution is at stake, more than in situations in which there is a work of individual authorship.”).

162. E.g., compare the famous guitar introduction to “Roll Over Beethoven,” CHUCK BERRY, Roll Over Beethoven (Chess Records 1956), available at https://www.youtube.com/watch?v=32C703sNwwy, with the introduction played by Carl Hogan on Louis Jordan’s 1946 song “Ain’t That Just Like a Woman (They’ll Do It Every Time),” LOUIS JORDAN AND HIS TYMPANY FIVE, Aint That Just Like A Woman (Decca Records 1946), available at https://www.youtube.com/watch?v=YEqiWTb-UWA. Berry has openly acknowledged the debt to Hogan. See FLANAGAN, supra note 118, at 85. Berry used the same introduction, with minor variations, to open several more hit songs, including “Johnny B. Goode” and “Carol.” See id.

163. THE WHO, Bargain, on WHO’S NEXT (Decca 1971) (lyrics by Pete Townshend).
I can name, played the riff and he played it and played the da-da-da-da riff, I could implicate the rhythm and he would remember the thing that I liked so much, and the same thing would happen, turned around, when I would play the riff, that I’d ask him to play a certain thing, seemed like to me, he would just fall in; and today, that same harmony exists . . .\footnote{Deposition of Charles E. Berry Volume I, supra note 19, at 61:23–62:8.}

And, similarly, from Johnson:

[S]ometimes you can hear a song for the first time, you almost know where they’re going from the first [chorus] that they sing, you can feel what they’re going to do next, and the same way on the piano, it got so that [Berry and I] stayed together so long, we could almost just look at each other and tell what the other one wanted him to do in the changing of the song.\footnote{Deposition of Johnnie Johnson Volume II, supra note 11, at 233:12–233:18.}

Johnson may have been playing what was, by itself, a preexisting or otherwise uncopyrightable blues chord progression or riff. But if he was doing so at a point where Berry had not yet developed a full melody for a given set of lyrics, that riff or progression could well have suggested a direction for the melody or a meter to the lyrics that helped the song reach its final copyrightable form. For example, take Berry’s description of how the classic “Roll Over Beethoven” was created:

Q. We discussed earlier, the inspiration for certain songs and the way the lyrics developed and the way the music developed. I wonder if you could tell us about “Roll Over Beethoven” and how that developed?

A. “Roll Over Beethoven” is a twelve-bar blues boogie, twelve-bar boogie blues, the music was not developed, it was just played boogie in C, and believe me, there is nothing different from playing boogie in C and hearing the lyrics to—what was the song you said?

Q. “Roll Over Beethoven.”

A. “Roll Over Beethoven”, “Johnny B. Goode”, you name it, all of the songs could carry the same background or music that each other has. So, how did the music develop? Johnnie played boogie in C, I sing the song, once my singing is a comparable and the music is in tone quality and volume, that song is made.

Q. How about the guitar?

A. Well, the drum too, for that matter, all of that has to coordinate, you know, with, what do you call it, favorable to the record owner, to the Chess Company, to Chess himself, if it’s favorable, if it sounds good, once we get it to sound good on one take, that’s a song, that’s what I mean.\footnote{Deposition of Charles E. Berry Volume II, supra note 11, at 293:3–293:25.}

“Boogie in C” is not, on its own, copyrightable: Johnson himself stated elsewhere in his own deposition that he learned the boogie bass part for “Roll Over Beethoven,” which he played on the piano with his left
hand, from Meade Lux Lewis.\textsuperscript{167} But by Johnson playing that bass part, with Berry’s vocalized lyrics and guitar on top of it, along with Johnson’s right hand treble playing and the drums and upright bass added in as well, we get “Roll Over Beethoven,” a masterpiece of rock and roll.\textsuperscript{168} To automatically foreclose the possibility that Johnson, or even the drummer and upright bass player, contributed to its creation in such a way as to be considered a joint author is closing our eyes to how, in the words of Justice Story, something “new and original in its substance” is generated.

Berry and Johnson’s creative process is not an anomaly; it is emblematic of high-level collaborative creation across fields and disciplines. Effective collaborators, psychological research reveals, are deeply tuned in to each other’s ideas, as each new idea is built on one that came before. These ideas, moreover, do not realize their full importance until they are adapted and applied by the other collaborators.\textsuperscript{169} The lesson here is that we should not bar the door to joint authorship based on whether, in a given dissected instance, one contributor added independently copyrightable expression. Requiring in all instances that each contribution be independently copyrightable conflicts with the reality of many, if not most, collaborative creations.

Copyrightability should thus only be a requirement for the work as a whole, not for each of the merged contributions that, like Berry’s and Johnson’s, are often inextricable. The present Copyright Act, in fact, specifies the two ways that a work can qualify as “joint”: it must consist of either “interdependent” or “inseparable” parts of a unitary whole.\textsuperscript{170} So for works that consist of \textit{inseparable} contributions, the \textit{Childress} and mastermind tests require that we judge the contributions’ copyrightability \textit{separately}. “Independently copyrightable inextricable contributions” seems oxymoronic at best.

\begin{itemize}
  \item \textsuperscript{167} See Deposition of Johnnie Johnson Volume II, \textit{supra} note 11, at 226:24–231:5 (“Q. And now, how much of [“Roll Over Beethoven”] is the sort of classic Meade Lux Lewis? A. The bass part . . . .”).
  \item \textsuperscript{168} See id. at 226–34 (describing further the mix of instruments and singing that comprised “Roll Over Beethoven”). For further information on “Roll Over Beethoven,” see Bruce Pegg, \textit{Chuck Berry—Roll Over Beethoven}, \textit{BRUCE PEGG—WORDS FOR THE MIND, BODY AND SPIRIT} (Mar. 1, 2015), http://brucepegg.com/2015/03/01/chuck-berry-roll-over-beethoven/.
  \item \textsuperscript{169} See KEITH SAWYER, \textit{GROUP GENIUS: THE CREATIVE POWER OF COLLABORATION} 15 (2007). For another example from rock and roll, in the documentary \textit{David Bowie: Five Years}, producer Brian Eno describes the interplay of Bowie’s guitarist, Carlos Alomar, and drummer, Dennis Davis, on the seminal album \textit{Low} thusly: “When you’re working with really great players like Carlos and Dennis you have to accept that they have a way of processing information that is beyond intellectual. But with their incredibly natural musicianship the two together produce something that, again, one wouldn’t have had with either on their own.” \textit{DAVID BOWIE: FIVE YEARS} (BBC 2013).
  \item \textsuperscript{170} See \textit{supra} note 35 and accompanying text.
\end{itemize}
And even if two contributions are considered interdependent, not inseparable, independent copyrightability still should not block the possibility of joint authorship. For example, Johnson testified that he had previously created the music to “Wee Wee Hours” as his theme song at the Cosmo Club and that Berry later added lyrics to it.171 If we believe Johnson’s testimony, then the lyrics and music of “Wee Wee Hours” would be considered interdependent contributions by joint authors, i.e., lyrics by Berry and music by Johnson. But would they each be independently copyrightable? Berry’s contribution likely would be, in that though he borrowed inspiration from Joe Turner’s “Wee Baby Blues,” he made his lyrics sufficiently different from Turner’s by using one of the myriad combinations the English language affords.

But Johnson’s musical contribution to “Wee Wee Hours” may not be copyrightable by itself, as it employed one of the standard chord progressions that had existed within the blues idiom for perhaps a century before the creation of “Wee Wee Hours.”172 Reflecting back on Berry’s and Johnson’s descriptions of their creative process, though, can we say for certain that Johnson’s music—his selection of the progression, the way he played it—did not inspire how Berry chose his lyrics and how he vocalized them to fit within this preexisting progression in a way that made, as a whole, a new copyrightable work?173 It seems bizarre that a song, copyrightable as such solely due to the combination of two men’s contributions could vest copyright in only one of them.174 But that is a possible, if not probable, outcome for “Wee Wee Hours” when subjected to the Childress or mastermind tests.

Moreover, what if Johnson had communicated only his musical ideas to Berry (after Berry sought them out in their hotel or on the road) and then Berry went into the studio with another piano player

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171. See supra note 99 and accompanying text.
173. See WEBB, supra note 66, at 212 (discussing how the choice of chord progression can influence a song’s melody: “[I]n modern songwriting melody is almost invariably chord-driven”); see also BYRNE, supra note 22, at 193–94 (discussing a collaboration with Brian Eno where “some of the lyrics and the plaintive melodies I came up with were a response to what I sensed was already there, hinted at, but buried deep in Eno’s music,” which consisted of harmonically simple chord structures, “much like traditional folk, country, or old-school gospel songs”).
174. As Judge Richard Posner has pointed out, there is also the bizarre possibility that the Childress test, when confronted with a copyrightable work created by multiple persons, none of whom in isolation contributed independently copyrightable expression, would vest authorship and copyright ownership in no one. See Gaiman v. McFarlane, 360 F.3d 644, 658–59 (7th Cir. 2004).
to record them? A strict application of the independent copyrightability rule would bar Johnson from joint authorship because he had not contributed expression “in a tangible medium.” But if Johnson’s ideas were integral to the song’s creation, it again seems bizarre that we must deny him credit for helping author it.

175. See supra note 79 and accompanying text for a discussion on how this could have occurred. Though Johnson’s deposition addresses the situation in a hypothetical fashion, it may well have occurred in real life. On several of Berry’s early songs, a pianist other than Johnson most likely played on the recording. See Rothwell, supra note 11, at 43. Chess session player Lafayette Leake, for instance, has long been listed as the pianist on the massive and extremely influential hit “Johnny B. Goode.” Id. at 53. The song is one which, incidentally, Berry has said was partially inspired by Johnnie Johnson. See Berry, supra note 108, at 156.

There has been some dispute over the years regarding which songs Johnson played on, as his recollections sometimes conflict with the recording session notes kept by Chess Records. See Fitzpatrick, supra note 3, at 92–95; Rothwell, supra note 11, at 43. For example, Berry expert Fred Rothwell once thought that Leake played on the released recording of “Sweet Little Sixteen,” based on the Chess notes, but after listening to outtakes found in the Chess vaults that contain audio of Berry talking to Johnson during the recording of “Sweet Little Sixteen,” Rothwell has since corrected himself. This reflects well on the accuracy of Johnson’s recollections regarding which songs he played on or, as he claims, helped create. Compare Rothwell, supra note 11, at 43, with Berry, Johnny B. Goode: His Complete 50s Chess Recordings, supra note 84, at 9–10 (containing liner notes by Fred Rothwell). Rothwell, though, presently still lists Leake as the pianist on a demo version of “Sweet Little Sixteen” found in these outtakes. Chuck Berry, Johnny B. Goode: His Complete 50s Chess Recordings, supra note 84, at 16.

However, a number of the Chess recording session contracts unearthed in the Johnson v. Berry case file have further clouded the picture of who played on what. For example, a contract for a session dated January 6, 1958—a day that Rothwell pegs for the recording of “Johnny B. Goode”—names Johnnie (misspelled “Johnnie”) Johnson as the band’s pianist. On the other hand, the contract for a “triple session” over January 7–9, 1964 lists “Nadine” as one of the songs recorded there, but does not name Johnson as one of the band members. See Recording Session Contract Between Aristocrat Record Corp. and Charles “Chuck” Berry (Jan. 14, 1964) (on file with the author); Recording Session Contract Between Leonard Chess and Chuck Berry Music Inc. (Jan. 6, 1958) (on file with the author); Fred Rothwell, New and Verified Information About Chuck Berry’s 1950’s Recording Sessions, CHUCK BERRY COLLECTORS BLOG (Jan. 22, 2015), http://www.crlf.de/ChuckBerry/blog/archives/170-New-And-Verified-Information-About-Chuck-Berrys-1950s-Recording-Sessions.html; see also Dietmar Rudolph, The Johnny B. Goode Session, CHUCK BERRY COLLECTORS BLOG (Mar. 25, 2015), http://www.crlf.de/ChuckBerry/blog/archives/174-The-Johnny-B.-Goode-Session.html.

What do we make of this? Berry’s and Johnson’s memories or ears for their own playing obviously cannot be relied on with certainty, and the contracts have a large reliability advantage given their closeness in time to the events at issue, but the contracts themselves have some issues. Often they were executed after the subject recording sessions occurred and were filed even later with the musician’s union (as evidenced by the union’s date stamp) creating a greater chance for mistakes (or monkey business) in listing the band personnel. Ultimately, for our purposes here, we should remember that just because Johnson may have played on “Johnny B. Goode” doesn’t mean he helped Berry write it, nor does the possibility that he didn’t play on “Nadine” necessarily mean he didn’t help write it before Berry recorded it at Chess.

176. See supra notes 20, 34 and accompanying text.

177. As David Nimmer has noted, the camel’s nose is perhaps already under the tent on this aspect of the independent copyrightability standard. See 1 NIMMER & NIMMER, supra note 19, § 6.07[A][3][c]. Judge Posner, as indicated above in note 174, has also challenged the idea
So we see how—when two or more people contribute to a process that by its nature relies heavily on uncopyrightable material—the law cuts many of them out of the joint authorship picture. We also see several powerful examples of why we should remove independent copyrightability as an absolute bar to joint authorship. Let us look back, then, to a question posed at the start of our independent copyrightability discussion: why does this bar exist? The answer rests primarily within another prevailing aspect of joint authorship: the “dominant author” theory.

3. Dominance Does Not Equal Sole Authorship

Courts’ reluctance to recognize non-dominant contributors in the joint authorship calculus, particularly those whose contributions are not independently copyrightable, stems largely from a preconception that creation naturally flows from one author. Regardless of where you end up after reading the testimony—believing Johnson, Berry, or a mix of both—I believe that the case helps refute the “dominant author” theory and, by extension, the mastermind test’s reliance on it. I say “helps” refute because, since at least the 1960s, scholarship outside the law has been dismantling the mythology surrounding the lone creative genius.

Literary critic and theorist Roland Barthes first proclaimed la mort de l’auteur—the death of the author—in his groundbreaking essay of the same name, expounding on the cultural influences that abound in every work and challenging the very concept of independent authorship. Barthes and his followers have sought to shift the focus of a creative work away from its author and onto its audience’s response to it.

Less radically, and more recently, scholars and artists have focused on disabusing us of the idea that the highest art is achieved by one artist alone. As film critics Stephen Farber and Marc Green put it in their essay The Genius of Creative Collaboration:

There is a long-standing prejudice against any work created by two or more people, a conviction that it must inevitably be inferior to a work that springs from one uncontaminated mind. This idealization of the solitary artist denies the value—and sometimes the very existence—of creative transactions among individuals, the yeast that gives rise to many works of fiction, theater, and film.

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The reverence for autonomous authorship probably has roots in the Romantic Age and its mythology of the Promethean spirit, but it also plays right into our contemporary culture of celebrity, which may be why the myth continues to flourish. . . . [S]tars make for better copy than ensembles. It is far more complicated (and considerably less sexy) to unravel the tangle of influences that contribute to a work of art than it is to extol the triumphs of a single creative genius.180

On the power of collaboration, Farber and Green quote the award-winning playwright and screenwriter Tony Kushner’s essay Is It a Fiction That Playwrights Create Alone?: “The smallest divisible human unit is two people, not one; one is a fiction. From such nets of souls, societies, the social world, human life springs. And also plays.”181

The legal world has also begun to challenge the dominant author theory, particularly in response to the rise of the Ninth Circuit’s mastermind test.182 Courts, however, with the Ninth Circuit as the main culprit, continue to perpetuate this myth, applying the mastermind test and its “dominance” factor regularly since 2000.183

181. Id. Kushner recently gained further fame by penning the Oscar-winning screenplay to 2012’s Lincoln. See Lincoln: Awards, IMDB, http://www.imdb.com/title/tt0443272/awards (last visited Feb. 22, 2015); see also THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jazi eds., 1994) (containing numerous essays analyzing the meaning of authorship and collaboration across law and literature); Sheena Hyndman, The O’Rourke Factor: Authorship, Authority, and Creative Collaboration in the Music of Wilco, 8 MUSICOLOGICAL EXPLORATIONS 7 (2007) (analyzing the creative contributions of the group Wilco’s producer); Phillip McIntyre, Creativity and Cultural Production: A Study of Contemporary Western Popular Music Songwriting, 1 CULTURAL SCI. 40, 40 (2008) (“The contemporary Western popular music industry . . . tends to maintain these myths of the creative individual, despite the evidence of the collaborative nature of record making or live performance.”); Peter Murphy, ‘I and I’: Collaboration and the Double Act of Musical Creation, 33 MUSICOLOGY AUSTL. 175, 175 (2011) (“[I]n truth, creation is the consequence of lonely geniuses together. The interaction of ‘I’ and ‘I’ adds the necessary soulful dimension to the work of the ego . . . . The strange looping that occurs between two egos, ‘T and T’, is a precondition of effective creativity.”); R. Keith Sawyer & Stacy DeZutter, Distributed Creativity: How Collective Creations Emerge from Collaboration, 3 PSYCHOL. AESTHETICS, CREATIVITY & ARTS 81, 81 (2009) (“[S]tudies of individual creators, when researchers focus on the social and cultural origins of their ideas, have revealed a high degree of collaboration behind their ideas.”). But see Margaret Chon, The Romantic Collective Author, 14 VAND. J. ENT. & TECH. L. 829, 844–47 (2012) (warning against similarly romanticizing collective authorship, particularly in the area of digital networks such as Wikipedia).
182. See, e.g., Hutchinson, supra note 42, at 92–93; Kwall, supra note 42, at 58–59; Mandel, supra note 54, at 349.
183. See, e.g., Garcia v. Google, Inc., 766 F.3d 929, 942–43 (9th Cir. 2014) (discussing dominance as key to authorship), en banc rehe’g granted, 771 F.3d 647 (9th Cir. 2014); Janky v. Lake County Convention & Visitors Bureau, 576 F.3d 356, 362 (7th Cir. 2009) (“Farag wielded considerable control over what the song finally looked like.”); 16 Casa Duse, LLC v. Merkin, No. 12 Civ. 3492, 2013 U.S. Dist. LEXIS 143958, at *29 (S.D.N.Y. Sept. 27, 2013) (“Plaintiff was indisputably the dominant author. Thus, Plaintiff is the sole author and Merkin is not an author at all.”); Corwin v. Quinonez, 858 F. Supp. 2d 903, 913 (N.D. Ohio 2012) (“Plaintiff cannot show
Johnson v. Berry presents, in my view, the latest and greatest challenge to the dominant author theory, one which cuts across the arts and the law and which provides a powerful reason to eliminate the courts’ mastermind test. It does so first, paradoxically, by the simple fact that Berry was, even by Johnson’s own admission, very clearly dominant. Berry was the initiator of the creative process, bringing the initial portions of the songs to Johnson, even if they were just the lyrics. Berry also, according to Johnson, had the final say on all creative choices. Berry was of course even more firm on the point, taking the position that even where Johnson contributed something to a song (e.g., “if Johnnie played a riff of his own”) it was because it was something Berry wanted and told him to play. So, Berry was the prototypical dominant contributor. Does that mean that Johnson should not also be considered an author of a song like “Nadine” if we believe his testimony that he created the horn riff so central to its music?

If we are willing to acknowledge the reality of creative collaboration, I think the answer is no. Simply because Berry brought the start of the songs to Johnson and would ultimately decide between the two of them whether Johnson’s contributions would be used, denying Johnson any chance to establish joint authorship whitewashes the significance of his contributions. Authorship, to summarize the commentators cited above, should not be a zero-sum game where you either dominate the work or you fail to count as an author. Collaborations will rarely, if ever, be fully equal, and incentivizing an artificial competition within those collaborations—as the dominance factor almost surely does—injects an unnecessary and perhaps even destructive element into the creative process.

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184. See supra note 61 and accompanying text.
185. See supra note 65 and accompanying text.
186. See supra notes 109, 116 and accompanying text.
187. See supra notes 85–88 and accompanying text.
188. See supra notes 180–81 and accompanying text.
189. See Farber & Green, supra note 180, at B18 ("Artistic partners are never going to be equal in every way. They may complement each other beautifully, but they must also adjust to their inequalities."). Looking to the example of Wilder and Diamond, who co-wrote the screenplays to such classic films as Some Like It Hot and Double Indemnity, Farber and Green observed:

Billy Wilder was clearly destined to be the star partner in any venture, and one reason his collaboration with I.A.L. Diamond worked so effectively was that Diamond was a fundamentally modest man, content in the role of second banana. Yet each of them was integral to the perfectly balanced team. Wilder and Diamond sparked each other, but even more important, they trusted each other. And, as Diamond attested, they both cared more about the quality of the work they produced than about winning an argument or claiming a credit.
Johnson v. Berry demonstrates well that a nondominant contributor may still make a substantial contribution to the finished work. The law should not only recognize this reality, it should protect it.

Johnson v. Berry further rebuffs the dominant author theory by virtue of Berry’s belief that the songs did not become what they became without the contributions of the band and producer. Although Berry saw himself as the leader and hence dominant over the band, he saw his bandmates’ playing as essential to a song’s musical formation. As he inimitably put it, “I need to show them what the song is, and the song is not a song, is not the song then.”

Under Berry’s direction, the other band members “will play whatever they play” and “[i]f that’s good for the song, it goes into the song, eventually we’ll have the entire song compiled and we’ll try and record it.” So Berry, clearly dominant, recognized the essential nature of his bandmates’ contributions. That he was dominant does not erase the reality of a collaborative process. But granting authorship only to Berry due largely (if not solely) to his dominance certainly denies that reality.

Further, if we are still inclined to view Berry’s dominance as a right to sole authorship, let us ask whether he was truly dominant, or in control, over the final form of the songs. Berry stressed that the songs were not final until they were recorded. He also described how the producer, Leonard Chess, had final say over the recordings. Johnson similarly acknowledged Chess’s control.

Must Chess be considered an author, perhaps even the sole author, of the songs? Berry and Johnson did not think so, and I think if we too take their view, the fallacy of the dominant author theory is revealed. Dominance and control do not always, if ever, equal sole authorship.

Id. Regarding the potentially destructive effects of the current joint authorship tests, see Mandel, supra note 54, at 349 (“The disincentive effects of joint author and joint inventor law on collaboration may have been less troubling when the doctrines developed a century or two ago, but they are highly problematic today because such an overriding proportion of valuable inventions are the result of collaboration, and a significant and growing amount of artistic works are as well.”).

190. See supra note 105 and accompanying text.
191. See supra note 110 and accompanying text.
192. See supra notes 105, 107 and accompanying text.
193. See supra notes 132, 166 and accompanying text.
194. See supra notes 71–73 and accompanying text.
195. Through their influence on the recording process, producers, particularly in the modern recording studio, may in certain cases contribute so much to the creation of a song that they could—or should—be considered its joint author. See Virgil Moorefield, The Producer as Composer: Shaping the Sounds of Popular Music 109 (2005); Fleet, supra note 28, at 1256–59. Given the limitations of the recording process in the 1950s and early ’60s and the nature of Berry and Johnson’s creative process—or, alternatively, Berry’s—Berry and Johnson were likely correct in not considering Leonard Chess a co-writer of the songs. It is still an intriguing question, though, particularly for modern recording. See, e.g., Eriq Gardner, Jay Z Faces Sound Engineer’s Bold Claim over Sound Rights, HOLLYWOOD REP. (July 9, 2014),
Vital creative input—what we may consider essential to authorship of a work—will often come from those without dominance or final control.

These non-dominant but substantial contributors, who may offer only independently uncopyrightable material, have regularly been swept beneath the rug of history. Johnson is arguably just the latest example. At the least, we can say with fair confidence that under the federal courts’ present tests, and irrespective of the statute of limitations, Johnson would never have had the chance to establish joint authorship of these songs.

4. Audience Appeal Rewrites Collaborative Creation

Audience appeal, the final factor of the mastermind test, is a similarly faulty attempt to evaluate joint authorship. This factor, in full, asks whether the “audience appeal of the work turns on each claimed joint author’s contribution, such that ‘the share of each contribution in the work’s success cannot be appraised.’” Two main problems exist with this inquiry. First, it encourages courts to invert the relationship between art and audience. When a work is conceived, no author, sole or joint, can know for certain what will ultimately appeal to the audience. When Johnson, per his testimony, first played the boogie bass part to “Roll Over Beethoven” in order to complete the song, he and Berry did not necessarily know (nor did Leonard Chess) whether that music would have “audience appeal” more or less than Berry’s lyrics, or at all. So using audience appeal—likely judged after a work has been exposed to an audience—to examine how the work was created encourages, at best, artistic revisionism.

At worst, however, the audience appeal factor encourages fixation on immediate commodification. “Audience appeal” will, given the three-year statute of limitations for joint authorship claims, necessarily look to the instant commercial results of a work—or what a court thinks will lead to such results—and how the contributions at

http://www.hollywoodreporter.com/thr-esq/jay-z-faces-sound-engineers-717385 (describing an ongoing joint authorship suit against rap artist Jay-Z by notable hip-hop sound engineer Chauncey Mahan). The point here is just that Chess should not automatically be deemed a song’s sole author simply because he had sole control over its final form.

196. See generally Jack Stillinger, Multiple Authorship and the Myth of the Solitary Genius (1991) (analyzing the multiple authorship of Keats’ Isabella, several of Wordsworth’s works, the novel Peyton Place, Shakespeare’s plays, and listing in an appendix—“Multiple Authorship from Homer to Ann Beattie”—a large sampling of instances of unacknowledged multiple authorship over the last two centuries).

197. Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000) (quoting Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 144 F.2d 266, 267 (2d Cir. 1944)).

198. See supra notes 89, 166–68 and accompanying text.
issue factored into them. However, as history has shown, many works are not appreciated or successful until years, sometimes centuries, after their creation. This factor, then, runs the great risk of discrediting a potential joint author based on a shortsighted definition of audience appeal, foreclosing full credit for a contribution that may, years later, be viewed as a substantial and lasting aspect of the work.

If Johnson had brought his claim before the statute of limitations expired—likely sometime between the late 1950s and mid-1960s depending on the song—an evaluation of audience appeal may have focused on something different from what we would consider appealing today. For example, on the transistor radios of the day (the primary way popular music was listened to) the audience may not have heard Johnson's piano, which Chess often placed very low in the mix, particularly on several of Berry and Johnson’s earliest recordings. On recent remastered releases of these recordings, we can often hear Johnson’s piano much more clearly.

Moreover, as both Berry and Johnson testified, Chess would occasionally remove the piano from the final released versions of some


200. See supra note 96 and accompanying text for Johnson’s discussion of the difficulty of hearing his piano on the recording of “Maybellene.” In discussing the song “School Day,” as well, Berry stated, “[F]or one thing, somebody put the piano way in the background, you can hardly hear the piano, especially going into the last refrain, you can hear a little tinkle on the turn.” Deposition of Charles E. Berry Volume I, supra note 19, at 126:23–127:1. In music lingo, this is referred to as an instrument being “buried in the mix” of a recording. See Ken Dryden, Review: The Wizard of Ragtime Piano, ALLMUSIC, http://www.allmusic.com/album/the-wizard-of-ragtime-piano-mw0000915435 (last visited Feb. 22, 2015). Modern “mixing” is usually done by the producer or sound engineer after the recording occurs, to set how the vocal and instrumental parts “mix” together audibly on the record released to the public, a process which involves, among other decisions, setting how loud a certain part, like the piano, is heard in relation to the other instruments and the vocalist. See ROOKSBY, supra note 22, at 150–54. However, prior to the advent of multi-track recording—where vocal or instrumental parts can be placed on separate “tracks” of an analog or, more recently, digital medium and then layered together or removed as desired—such mixing was mostly, if not solely, accomplished by setting the location of microphones in the recording studio and by adjusting the volume of the input received from those microphones to control the different parts of what was essentially a live performance in the studio. See The Development of Multi-Track Recording Techniques, Eur. Sound Directors Ass’n, http://www.eusound.org/submissions/annex/02.asp (last visited Feb. 22, 2015). Chess Studios, specifically, did not install multi-track recording equipment until around 1960–61; so for earlier recordings, Chess would likely have used the location and volume of the studio microphones to control the piano’s placement in the mix. See COHODAS, supra note 11, at 203.

201. See, e.g., BERRY, JOHNNY B. GOODE: HIS COMPLETE 50s CHESS RECORDINGS, supra note 84.
songs. Johnson claimed he helped create the music for
“Havana Moon,” which he said started when Berry heard him playing
Nat King Cole’s “I’m Just a Shy Guy.” Johnson further claimed that
he played the piano at a session in which they recorded “Havana
Moon,” but the version that Chess released did not contain his part.
In such cases, then, the audience appeal of Johnson’s contributions
would be very difficult, if not impossible, to determine. If the piano
influenced the melody, one could gauge audience appeal based on the
melody as expressed through the vocal and guitar; without the piano,
however, the appeal factor seems unfairly predisposed toward Berry’s
contribution.

In sum, the audience appeal factor—like intent, independent
copyrightability, and dominance—misplaces the focus of joint
authorship away from the process that created the work. It is the
whole work, and the process that created it, that should be the
primary focus of any joint authorship inquiry.

V. A SOLUTION: THE “BERRY-JOHNSON” TEST

Copyright law has throughout its history struggled to align
itself with the reality of artistic creation. A prominent failure in
this regard has been copyright’s uneasy fit with music that stems from
oral traditions, particularly jazz, the blues, and the blues’ descendent,
rock and roll—all forms that advance primarily through artists’ use of

202. See supra note 132 and accompanying text. In order to “remove” the piano from a
recording made prior to 1960–61, Chess would likely have had to record the song again without
piano. See supra note 200 and accompanying text.

203. See id. Berry specifically disputed this and also claimed that only Nat King Cole’s
“Calypso Blues,” not “I’m Just a Shy Guy,” influenced “Havana Moon.” See Deposition of Charles
E. Berry Volume II, supra note 11, at 235:18–238:6 (“Johnnie Johnson had nothing to do with
this song.”). Johnson’s further testimony about the song indicates his recollection that as he and
Berry worked on “Havana Moon,” “Calypso Blues” also became an influence and eventually the
dominant one, so dominant that it appears Johnson mistakenly thought “Calypso Blues” was
actually itself called “Havana Moon.” See Deposition of Johnnie Johnson Volume II, supra note
heard sing it. It’s either Nat King Cole or Harry Belafonte, either one of those two people’s song,
I’m not sure which, but I’d say one of the writers.”); see also id. at 314:16–314:21 (“[‘I’m Just a
Shy Guy’] was something I was reminiscing with in the studio, we’d be getting ready to record
something, and he would hear this and he would say, Nat King Cole. He loved Nat King Cole’s
type of music, and I could play it, and that’s how we would get together and see what songs we
could work out together of Nat King Cole’s.”). With respect to how Johnson’s piano might have
been removed from “Havana Moon,” Chess would likely have had to have the musicians, sans
Johnson, record it again. See supra notes 200, 202 and accompanying text.

205. See, e.g., PATRY, supra note 155, at 49–74; VAIYANATHAN, supra note 149, at 17–
34, 117–48; Olufunmilayo B. Arewa, The Freedom to Copy: Copyright, Creation, and Context, 41
U.C. DAVIS L. REV. 477, 479–83 (2007); Jessica Litman, Copyright as Myth, 53 U. PIT. L. REV.
By focusing on such concepts as originality, intent, and dominance, copyright has devalued and often tossed aside the creations of artists within these genres. The present joint authorship tests, I believe, are in many ways a microcosm of these systemic flaws.

Should we completely overhaul the existing copyright system? Prominent commentators have recently suggested as much. But they have also recognized that the political power of the present copyright regime is too great to expect such radical change, at least anytime soon. So in the meantime I propose a significant but certainly more incremental change: a new and better test to determine joint authorship.

A. Two Requirements: Intent to Merge and Substantial Contribution to the Essence of the Work

The “Berry-Johnson” test, as I would name it, requires a joint authorship claimant to establish two things:

1. all purported joint authors intended to merge their contributions into one work; and
2. the claimant substantially contributed to the essence of the work.

To decide the second requirement, the court should consider:

1. the impact that the claimant’s contribution had on the work relative to that of other contributions;

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Prevailing views of borrowing in copyright discourse are closely connected to at times vague and mystical representations of creativity that assume that copying of existing texts reflects a lack of creativity or originality. . . . These assumptions about creation are often quite contrary to how creation actually occurs, which presents tremendous problems for a broad range of cultural texts, including those that reflect an African American aesthetic of repetition and revision. \textit{Id.} at 598.


(2) any evidence that other contributors viewed the claimant as having substantially contributed to the essence of the work; and

(3) any relevant custom or practice, in the industry or field in which the work was created, that treats (or does not treat) contributions similar to the claimant’s as joint authorship of works similar to the one at issue.\(^\text{210}\)

I believe this test faithfully applies the present Copyright Act in that it tracks the “intent to merge” reading of Section 101’s term “intention” and because its use of the phrase “substantially contributed to the essence of the work” reasonably applies to the term “authors” in Section 101 (i.e., what author does not substantially contribute to the essence of his or her work?).

But Congress could certainly clarify things by expressly codifying the Berry-Johnson test in the Act. Doing so would be relatively easy: first, amend the Act to insert the word “joint” before “authors” into the definition of “joint work”:

Joint work: a work prepared by two or more joint authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.\(^\text{211}\)

Then insert the following definition of “joint author” into the Act:

A “joint author” is one who has substantially contributed to the essence of a work.

The following exclusive considerations shall be used to determine whether one has substantially contributed to the essence of a work:

(1) the impact that the purported joint author’s contribution had on the work relative to that of other contributions;

\(^{210}\) There will be those cases in which a party will attempt to establish that someone else was a joint author to a work. \textit{See}, e.g., Janky v. Lake County Convention \& Visitors Bureau, 576 F.3d 356, 358 (7th Cir. 2009). In such cases, the word “claimant” can be changed to “purported joint author.”

\(^{211}\) \textit{Cf.} 17 U.S.C. 101 (2012). This definition could be further modified to address the issue, identified by David Nimmer, that “joint work” presently defines only jointly authored works, not all joint works, such as those that are joint solely because of split ownership. \textit{See supra} note 36 and accompanying text.
(2) any evidence that other contributors considered the purported joint author to have substantially contributed to the essence of the work; and

(3) any relevant custom or practice, in the industry or field in which the work was created, that treats (or does not treat) contributions similar to the contribution at issue as joint authorship of works similar to the work at issue.

The first of the two joint authorship requirements—intent to merge contributions into one work—simply tracks the existing definition of joint work in the Copyright Act and makes clear that such intent truly means “intent to merge” and not “intent to be considered a joint author.”212 The second requirement constitutes the more significant change to the existing tests, setting a new standard for measuring the nature of contribution necessary to be deemed a joint author—namely, whether one has “substantially contributed to the essence of the work.”

The first word in this phrase, “substantially,” is left undefined so that courts can employ its full range of meaning in the context of a given case, with Webster’s for instance defining “substantial” as both “important, essential” and “considerable in quantity.”213 In this way,

212. See supra notes 136–43 and accompanying text.
213. Substantial, Merriam-Webster, http://www.merriam-webster.com/dictionary/substantial (last visited Feb. 22, 2015). US copyright law is already familiar with the term “substantial,” as it regularly employs the phrase “substantial similarity” as the test for whether one work infringes the copyright of another. See, e.g., Intervest Constr., Inc. v. Canterbury Estate Homes, Inc., 554 F.3d 914, 920 (11th Cir. 2008). British courts have used the similar term “significant” in determining whether a contribution constitutes joint authorship. See, e.g., Fisher v. Brooker, [2006] EWCH (Ch) 3239 (Eng.); Hadley v. Kemp, [1999] EMLR 589; see also Lionel Bently, Authorship of Popular Music in UK Copyright Law, 12 INFO., COMM. & SOCY 179, 190–91 (2009); Shane O’Connor, A Critical Evaluation of the Law of Copyright Authorship in Relation to Derivative Works, 3 WESTMINSTER L. REV. 1, 4 (2014). Lionel Bently has suggested that the term “substantial” would function better than “significant” because it would better steer the focus of the joint authorship analysis toward qualitative (not just quantitative) contributions, noting that “substantial” is also used in the British test for copyright infringement. See Bently, supra note 213, at 197 (citing Copyright, Designs and Patents Act, 1988, c. 48, § 16(3) (U.K.)).

Given then that substantiality is the standard that measures the protection a work receives from infringement in the United States as well as in the United Kingdom, a nice synergy is created by requiring that one substantially contribute to the essence of a work before he or she can qualify as a joint author. Put another way, just as a work must be substantially similar to another to have infringed it, a contribution to a work must also be substantial in order to qualify for joint authorship.

One important caveat: this synergy should be positive as long as we keep in mind that the substantiality analysis for infringement ultimately looks at the similarity of the allegedly infringing work to the copyrightable aspects of the allegedly infringed work, but substantiality, as it is to be used here for joint authorship, looks only at a particular contribution to a work—a contribution which need not, under the Berry-Johnson test, be independently copyrightable. So in certain cases, a contribution may be substantial enough to qualify for joint authorship, but because it is separately uncopyrightable, it could not by itself be used to support
both qualitatively and quantitatively substantial contributions are eligible for joint authorship. “Essence” is also undefined so as to use its common meaning, which Webster’s defines as “the basic nature of a thing: the quality or qualities that make a thing what it is.”

Courts have long utilized the term “essence” and the phrase “essence of the work” in copyright fair use cases to help determine whether a potentially infringing work has used the essence of a copyright-protected work. Using an aspect of a copyrighted work that does not constitute its essence weighs in favor of finding that use “fair” and thus safe from liability, whereas using its essence weighs against fair use. For joint authorship, as well, “essence of the work”

a finding of infringement. Some may question whether this creates an inconsistency. However, because a substantial but separately uncopyrightable contribution to a work (such as, perhaps, Johnson’s musical contribution to “Sweet Little Sixteen”) can be combined with another contribution (such as, potentially, Berry’s musical and lyrical contribution to “Sweet Little Sixteen”) to create, together, independently copyrightable expression that, if copied in a substantially similar form (such as, conceivably, by the Beach Boys in “Surfin’ U.S.A.”), will support a finding of infringement, I believe that the Berry-Johnson test’s use of the term “substantially” does not conflict with the existing law of infringement. See supra note 11 and accompanying text (describing the Beach Boys’ potential infringement of “Sweet Little Sixteen” in creating “Surfin’ U.S.A.”).


215. See, e.g., Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998) (emphasis added) (“[T]he more of a copyrighted work that is taken, the less likely the use is to be fair, and that even a less substantial taking may be unfair if it captures the essence of the copyrighted work.” (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564–65 (1985))); Triangle Publ’ns., Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1177 (5th Cir. 1980) (emphasis added) (“Here, Knight-Ridder did not copy what is the essence of TV Guide[,] the television schedules and articles. It simply reproduced covers of old TV Guide issues. We do not mean to trivialize the covers of TV Guide, but simply emphasize that this factor [of the fair use test] would have been entitled to more weight had, for example, some of the contents been used.”); United States v. Am. Soc’y of Composers, Authors & Publishers, 599 F. Supp. 2d 415, 430 (S.D.N.Y. 2009) (emphasis added) (internal quotation marks omitted) (“[A]pplicant has still failed to establish that its previews do not copy the essence of the songs, that is, the most readily identifiable parts of the songs. . . . [I]ts previews typically incorporate repetitive portions of songs, which are sometimes deemed the most significant, . . . qualitatively substantial portions of ASCAP music.”); H.C. Wainwright & Co. v. Wall St. Transcript Corp., 418 F. Supp. 620, 625 (S.D.N.Y. 1976) (emphasis added) (“[T]he Transcript’s abstracts do not constitute a fair use of Wainwright’s reports. The takings have been substantial in quality, and absolutely, if not relatively substantial in quantity. Compelled by their very raison d’etre to present the essence of the Wainwright reports the Transcript abstracts suck the marrow from the bone of Wainwright’s work . . . .”).

216. See, e.g., supra note 215 and accompanying text. The “essence” concept is also used in the infringement context when courts are analyzing what Nimmer has called “comprehensive nonliteral similarity,” attempting to determine “similarity ‘not just as to a particular line or paragraph or other minor segment, but where the fundamental essence or structure of one work is duplicated in another.’” Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231, 240 (2d. Cir. 1983) (quoting 4 NIMMER & NIMMER, supra note 19, § 13.03[A][1]); Situation Mgmt. Sys. v. ASP Consulting Grp., 535 F. Supp. 2d 231, 240 (D. Mass. 2008) (emphasis added) (quoting 4 NIMMER & NIMMER, supra note 19, § 13.03[A][1]). Further, commentator Denielle Stritch has used “essence of the work” to describe the focus of the Janky joint authorship case and to explain why
will allow judge and jury the flexibility to determine in each unique creative situation what really constitutes and drives the work—i.e., what are its core qualities?—and then to decide whether a purported joint author has substantially contributed to those core qualities.\textsuperscript{217}

For example, in Johnson v. Berry, a jury would have had to decide whether the music of a given song was part of its essence or if it merely played a minor, marginal role—particularly given Berry’s testimony that the lyrics were what drove the songs—and then whether Johnson substantially contributed to that music’s creation.\textsuperscript{218} The phrase “substantially contributed to the essence of the work” thus aims to set a bar for joint authorship that does not risk being too low (such as Nimmer’s “de minimis” standard, which allows any contribution but the most minimal, such as a word or line of text, to qualify) or too high, such as “independently copyrightable” or something else like “indispensable” or “dominant influence.”\textsuperscript{219}

\textbf{B. A Three-Factor Guide to Determining Substantial Contribution: Relative Impact, Other Contributors’ Views, and Industry Custom}

Further, to help navigate between these two extremes, the Berry-Johnson test provides an exclusive three-factor guide to determining whether a purported joint author has substantially contributed to the essence of the work. The guide is “exclusive” in order to at least discourage, if not foreclose, reliance on the present tests’ considerations—self-regard as author, independent...

\textsuperscript{217} The Lee court wisely observed that flexibility in these situations is vital, as “[d]ifferent people do creative work together in different ways, and even among the same people working together the relationship may change over time as the work proceeds.” Aalmuhammed v. Lee, 202 F.3d 1227, 1235 (9th Cir. 2000). For those who might criticize “essence of the work” as vague instead of flexible, it seems to have fit fine in the fair use and infringement contexts, and I believe it fits as well, if not better, with joint authorship, at least as compared to the existing tests. See supra notes 215–16 and accompanying text. In my view, “essence of the work” gets to the heart of what joint authorship aims to identify: whether someone’s contribution impacts the core nature of the work, not its periphery. In the case of music to a song, its core nature might be its melodic or rhythmic “hook” or “hooks” as opposed to the accompaniment that follows these hooks. See supra notes 22, 26–29 and accompanying text. For a book, it would often be the narrative story. For an architectural drawing, it may be the design of the structure. The creators themselves, as well as experts in the relevant industries or fields, can testify on what is considered the essence of the particular work or type of work at issue. Ultimately, the determination is left to the judge or jury, whichever is the finder of fact in a particular case.

\textsuperscript{218} See supra notes 117–18 and accompanying text.

\textsuperscript{219} See supra notes 158–77 and accompanying text (regarding the “independent copyrightability” standard). For a more detailed discussion of Nimmer’s “de minimis” standard, see 1 Nimmer & Nimmer, supra note 19, § 6.07[A][1].
copyrightability, dominance, and audience appeal—focusing courts instead on the new test’s three factors.220

The first of the three, the relative impact of the contribution, provides an initial instrument with which to judge the substantiality of a contribution: how does it compare to other contributions to the work? Was it relatively small, such as proofreading compared to drafting the text, or more significant, such as a screenplay compared to a director’s plotting of scenes, direction of cameras, and instructions to actors? Webster’s defines “impact” in this context as “having a strong . . . effect on . . . something.”221 A screenplay inarguably has a substantially strong effect on the essence of a film, even considering the strong (and often stronger) effect of a director’s contribution. Proofreading would—in nearly if not every circumstance—not have a substantially strong effect on the essence of a finished book compared to drafting the text.222 Thus, a flexible but meaningful initial tool sets forth a basic principle: the substantiality of a contribution can only be judged, and judged best, in the context of the entire work.

However, so that a court will not have to judge substantiality entirely on its own, the test employs two more factors. The second—any evidence that other contributors considered the purported joint author to have substantially contributed to the essence of the work—recognizes that the contributors themselves will usually have vital and irreplaceable insight into what constitutes a substantial contribution to the essence of their work, particularly if

220. Another way of handling the possibility that authorial self-regard, dominance, or audience appeal might sneak back into the analysis would be to delineate that these factors, at least, cannot be dispositive for joint authorship, like the amendment to Section 107 of the Copyright Act, which specified that publication cannot be dispositive for fair use. See Fair Use of Unpublished Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992) (codified as amended at 17 U.S.C. § 107 (2012)) (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”).


222. Very significant editing, however, to the extent that it substantially changes the essence of a written work—substantially altering the story underlying a novel for instance—might rise to the level of joint authorship. There are many historical examples of such situations. See, e.g., STILLINGER, supra note 196, at 139–62 (detailing, in the context of the American novel, numerous examples of editing so extensive that it might be considered joint authorship); Giles Harvey, The Two Raymond Carvers, N.Y. REV. BOOKS, May 27, 2010, available at http://www.nybooks.com/articles/archives/2010/may/27/two-raymond-carvers/; Sameer Rahim, The Mystery of Poetry Editing: From TS Eliot to John Burnside, TELEGRAPH (Jan. 23, 2012), http://www.telegraph.co.uk/culture/books/9025194/The-mystery-of-poetry-editing-from-TS-Eliot-to-John-Burnside.html. The Berry-Johnson test is equipped to handle these situations and realistically analyze them, unlike the present joint authorship tests, which would likely apply to them the dull blades of authorial self-regard or dominance, ignoring the possibility that these editors contributed to the works so substantially that they could be considered their joint authors.
the work is fairly complicated or unique. This factor, then, takes the place of the “self-regard” analysis so favored in the Childress and mastermind tests, keeping its good thought (“let’s ask the creators themselves”) and discarding the bad (“let’s rely on how they viewed themselves”). The Berry-Johnson test instead examines how the creators viewed each other’s contributions.

In some cases this may represent a distinction without a difference, but in others it may cause a huge, positive change. In Johnson v. Berry, it is the difference between asking how Berry viewed Johnson (definitely not as a joint author) versus how he viewed the significance of Johnson’s contributions (as, arguably, very substantial). More significant though than statements made in litigation—like Berry’s remark that he “never knew a song where Johnnie was the major factor”—would be any pre-litigation evidence of how contributors viewed each other’s contributions. For example, is there any evidence that Berry ever told Johnson or someone else that the horn riff in “Nadine” “tied the song together,” “made the song work,” or something else to that effect? Conversely, did Berry tell someone that Johnson did not help much with creating the music?223

In this way, again, the Berry-Johnson test directs the joint authorship analysis more toward the work itself.

The third and final factor, “custom or practice,” recognizes that though each creative process is unique, there are often unifying characteristics within traditional forms of creation. Courts should thus take into account, and not lightly change, established customs or practices for joint authorship within, for example, the music or film industries, literature, academia, and architecture.224 The parties may,
and likely will, introduce expert testimony on this factor, explaining how existing relevant customs or practices typically treat contributions similar to the one at issue. Here, hypothetically, Johnson might have called an expert to testify that riffs providing the hook of a song or influencing its melodic direction are customarily credited or viewed by songwriters as constituting joint authorship of a rock and roll song. Berry, conversely, could perhaps have found an expert to testify that riffs of this type are customarily considered within the music industry to be a part of a song’s arrangement, not the song itself.225

This third factor thus helps balance the other elements of the test, which Childress or mastermind proponents may find concerning, so as to prevent copyright from “exploding.” By giving one-third of the legal weight to established customs and practices, the Berry-Johnson test is unlikely to open the joint authorship floodgates. Contributors within fields that customarily view their input as insubstantial will be deterred from filing suit and will have a high bar to clear if they do file, ensuring that where exceptions to existing custom are made, they are justified.226

63–64; VerSteeg, supra note 43, at 179 and n.206. The Berry-Johnson test cuts out this middleman and presents an analytically cleaner and more direct approach to factoring relevant customs and practices into the joint authorship determination.

225. See supra notes 21–22 and accompanying text. Such expert witnesses could, for example, have been (or could be, in a prospective case) musicologists or accomplished songwriters. Keith Richards, for instance, would most certainly have been qualified to offer expert testimony in Johnson v. Berry had he been called as a witness, given his prolific songwriting with the Rolling Stones and his longtime work within the music industry, not to mention his experience playing the songs at issue on his own as well as alongside both Berry and Johnson.

226. Jennifer Rothman has extensively analyzed the concept of utilizing custom in intellectual property law, arguing that it will often create more problems than it solves, particularly in the realm of fair use and licensing. See Jennifer Rothman, The Questionable Use of Custom in Intellectual Property, 93 VA. L. REV. 1899 (2007) [hereinafter Rothman, The Questionable Use of Custom]; Jennifer Rothman, Why Custom Cannot Save Copyright’s Fair Use Defense, 93 VA. L. REV. BRIEF 243 (2008). Rothman’s concerns, however, reside primarily in the risk that relying on industry custom will expand the scope of copyright protection in ways that limit fair use and the public domain. See Rothman, The Questionable Use of Custom, supra note 226, at 1904–07, 1947, 1951–65. Here, the Berry-Johnson test simply aims to better determine copyright ownership among putative authors of a given work, neither restricting nor expanding the scope of that work’s protection. Further, as an exception to her concerns, Rothman recognizes that where “custom is standing in only for evidence of a positive proposition, such as ‘this is what is generally done,’” it may serve a useful role in intellectual property. Id. at 1978–79. This is exactly how custom is utilized in the Berry-Johnson test. Rothman, though, appends this exception, arguing that it should only apply where a custom is “certain.” See id. As few things in this life are certain, I respectfully disagree that certainty should be required before a custom or practice can serve as useful evidence of joint authorship, particularly because custom, as one of three factors, is not dispositive in the Berry-Johnson analysis. A trial judge would of course also have discretion to prohibit the introduction of such evidence in a given case if he or she finds it irrelevant to the creative work at issue or so slight or conflicted that its probative value is
The Berry-Johnson test, in sum, provides a flexible, dynamic way of evaluating joint authorship that avoids many of the pitfalls that exist under the current Childress and mastermind tests. It further aims to strike a balance between the competing concerns of those tests’ critics and supporters. By focusing more on the work itself and the various contributions’ impact on it, as well as by stripping away less relevant or discredited factors, the Berry-Johnson test presents fewer barriers to joint authorship for creative contributors.

But by requiring a substantial contribution to the essence of the work, the test will still ensure that joint authorship is reserved for major contributors, and it should easily filter out those on the fringes, such as the oft-cited editorial assistant or dinner party idea-pitchman. In other words, it addresses Judge Posner’s concern that expanding joint authorship too far would explode copyright. Further, by making industry custom a key consideration, the test should minimize or eliminate the risk of courts drastically reconstituting how copyright-reliant industries—music, film, books—regularly determine joint authorship for themselves, outside of litigation, thereby promoting predictability and certainty of copyright ownership.

A potential related pitfall is this factor’s use of the term “joint authorship” itself, which could blur the line between industry practice and the ultimate legal issue. In other words, by using this term, does this factor problematically invite creative industries to foist their own legal conclusion regarding “joint authorship” on a given dispute? Another term, perhaps “co-creation” or “joint creation,” could be used instead. I think, though, that “joint authorship” is the best choice. As discussed above with respect to Jennifer Rothman’s work, the factor simply invites evidence of how an industry or field normally treats the contribution at issue, and because different industries or fields may use different words to describe authorship, e.g., “create,” “develop,” “draft,” or “produce,” the overarching term “joint authorship” prevents confusion and promotes a unified standard. Further, federal courts already can and often do permit experts to testify on ultimate issues, including in copyright cases. See, e.g., Fed. R. Evid. 704(a) (“An opinion is not objectionable just because it embraces an ultimate issue.”); Plains Cotton Coop. Ass’n of Lubbock, Tex. v. Goodpasture Computer Serv., Inc., 807 F.2d 1256, 1260–61 (5th Cir. 1987) (affirming decision for the defendants in an infringement case based in part on expert testimony that they “did not copy”). So, inviting expert testimony on whether a given industry customarily considers a particular contribution to constitute joint authorship does not inject a substantively new concept into joint authorship cases or federal litigation in general; it simply presents a more direct way of addressing an issue with which courts are already wrestling. See supra note 224.

227. See supra note 43 and accompanying text.

228. See Reid, 490 U.S. at 749. There is of course the possibility, if not probability, that court decisions utilizing the Berry-Johnson test could, over time, change the way some industries or fields determine joint authorship. The key point here is that such change is unlikely to occur in an overnight, drastic manner. An inherent problem posed by changing the test for joint authorship, or by changing any existing legal doctrine, is that people have relied on that doctrine and molded their conduct and expectations to it. See Stefanie A. Lindquist & Frank C. Cross, Stability, Predictability and the Rule of Law: STARE DECISIS AS RECIPROCITY NORM (2010),
C. How to Deal with Contributors Who Are Not Joint Authors

Finally, in connection with the Berry-Johnson test, I propose inserting an additional provision into the Copyright Act that would clarify, along the following lines, how to deal with the independently copyrightable contributions of those determined not to be joint authors:

Compulsory License for Works Created as Contributions to Other Works

(a) For any work:
(1) prepared by two or more persons with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole, and
(2) where any such person is not a joint author of the work but his or her contribution to the work constitutes a copyrightable work itself, the author or authors of the work shall have a compulsory license to use such person’s contribution to the work as part of the work for any lawful purpose.

(b) This license shall be valid, enforceable, exclusive, irrevocable, and not subject to termination except:
(1) as otherwise agreed in writing by such person and the author or authors of the work, or
(2) as adjudicated by a federal court of competent jurisdiction if:
   (A) such person’s contribution to the work was induced by fraud, duress, or undue influence, or
   (B) such person lacked the capacity to enter into a contract to license a copyrighted work at the time his

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available at http://www.utexas.edu/law/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf ("In the absence of stability and predictability in law, citizens have difficulty managing their affairs effectively."). However, by incorporating existing customs and practices into the Berry-Johnson test, I believe that this problem will be minimized if not largely eliminated. Existing custom, influenced by the previous tests, will be factored into the law moving forward. But because judges and juries will not be bound exclusively to these customs and practices—they are only one-third of the analysis—case decisions can, at a moderate pace, guide positive change. And where the present law is at odds with customs and practices—such as in emerging fields in which authorship disputes have yet to be litigated—the Berry-Johnson test will have the potential to bring the law into harmony with practical experience as well as unanticipated new forms of technology and art. Overall, the Berry-Johnson test aims to bring joint authorship a greater but measured flexibility, bending the law toward social conduct and social conduct toward the law without breaking the connection between the two.
or her contribution to the work was fixed in a tangible medium of expression.
The applicable law for purposes of subsection (b)(2) shall be the law of the state in which such person was domiciled at the time his or her contribution to the work was fixed in a tangible medium of expression.\(^{229}\)

On top of the difficult issue of determining who is a joint author, courts have also wrestled with what to do where a person has contributed independently copyrightable expression to a larger work but is not a joint author of that work.\(^{230}\) No present provision of the Copyright Act directly addresses the issue, but the law does appear to allow for the possibility that such a person can (1) assert copyright ownership in his or her individual contribution, presuming it constitutes an independently copyrightable work, (2) revoke any implied license that the author of the larger work had to use that contribution, and thus (3) effectively block the author’s further use of the larger work.\(^{231}\)

\(^{229}\) For section (b)(2), the state choice of law provision aspires to respect each individual state’s laws protecting its citizens from fraud, duress, or undue influence, as well as its minors or those lacking mental capacity—i.e., all those who had no fair ability to separately negotiate a license (“otherwise in writing”)—from being taken advantage of by a compulsory license. See Radha A. Pathak, Incorporated State Law, 61 CASE W. RES. L. REV. 823 (2011) (generally discussing the incorporation of state law into federal statutes); cf. John Hart Ely, Choice of Law and the State’s Interest in Protecting Its Own, 23 WM. & MARY L. REV. 173 (1981) (discussing the relative merits of protecting state citizens’ interests through choice of law). On the other hand, the exclusive federal court forum designation aims to place the application of those state laws in the hands of courts that are more invested in creating a consistent precedent that respects the importance of the compulsory license for federal copyright law. It also aids to prevent separate state and federal litigation—i.e., a state court action to invalidate a license and then a federal court copyright infringement action—when one court can decide both claims.

For section (b)(1), there is no choice of law provision or forum designation, so as not to try to untangle the existing, knotty issues regarding what law applies to copyright licensing agreements and the proper forum for disputes over such agreements, as well as to allow the contracting parties the freedom to select their own governing law or dispute resolution forum. See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) (“[A] valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases.”); see, e.g., Key Constr., Inc. v. State Auto Prop. & Cas. Ins. Co., 551 F. Supp. 2d 1266, 1269 (D. Kan. 2008) (showing that a federal court will, as a general rule, apply the law of the state in which it is located, and will uphold a choice of law provision if that state’s law recognizes its validity); Brandon Beam, Comment, Untangling Jurisdiction and Contract Scope Issues with Intellectual Property Licenses, 34 U. ARK. LITTLE ROCK L. REV. 391 (2012).


\(^{231}\) See, e.g., Ulloa, 303 F. Supp. 2d at 416–17 (finding that a guest vocalist on a recording by the rap artist Jay-Z was not a joint author of the song being recorded because Jay-Z did not intend for her to be an author, but refusing to grant Jay-Z’s motion for summary judgment on her claim that (a) she was the author and owner of the copyright in the melodic
In Johnson v. Berry, this means that, in theory, Johnson could have raised a very significant alternative argument: namely, if he was found not to be the songs’ joint author, his contributions to at least several of them constituted, by themselves, independently copyrightable works and therefore he owned, by himself, the copyright in those contributions. If Johnson could have overcome the fact that he had not previously obtained a copyright registration for his individual contributions (a significant “if” given the 1909 Act’s registration requirement),232 this argument might have opened the

“vocal phrase” she created during the recording session, that (b) she had revoked any implied license Jay-Z had to use it, and that (c) he was now infringing her copyright by using the song that included her vocals).

232. See supra note 19 and accompanying text. Despite the 1909 Act’s generally strict requirement that works had to be registered to obtain copyright protection, subsequent Congressional amendments to the law may well have permitted Johnson, on the eve of his suit, to obtain (or at least validly apply for) registrations for any individual independently copyrightable contributions to the songs.

First, these contributions were arguably never “published” in the legal sense of the word, such that they never lost common law copyright protection before 1978. See 17 U.S.C. § 303(b) (2012) (“The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of any musical work, dramatic work, or literary work embodied therein.”); see also 1 Nimmer & Nimmer, supra note 19, § 4.01–4.04 (describing how and why publication without registration generally divested common law copyright protection and placed works in the public domain); id. § 4.08 (noting that public performance of a work—and Johnson’s contributions were definitely performed publicly—is generally not considered a “publication” under the 1909 Act); id. § 4.01–4.04. And works protected by common law copyright as of January 1, 1978 automatically (i.e., without the need for registration) received federal copyright protection with a standard duration of the life of the author plus seventy years. See 17 U.S.C. §§ 302–303 (2012); 3 Nimmer & Nimmer, supra note 19, § 9.09. To the extent Johnson’s individual contributions were published, it would likely have only been as part of the sheet music created to register the songs in Berry’s name, not Johnson’s. Johnson would therefore have had at least a colorable argument that his contributions were not published with his consent, a requirement under the law. See 1 Nimmer & Nimmer, supra note 19, § 4.03; see also SmokEnders v. Smoke No More, 184 U.S.P.Q. 309 (S.D. Fla. 1974) (“Unauthorized publication will not divest an author of his common law copyright.”).

Second, with respect to any of Johnson’s contributions contained in songs that came out after 1963 (“Nadine,” “No Particular Place to Go,” “You Never Can Tell,” and “Promised Land”), even if they were “published,” they would have been covered by the Copyright Amendments Act of 1992, which established that the copyright in any work copyrighted through either registration or publication between January 1, 1964, and December 31, 1977, would automatically renew for sixty-seven years upon the expiration of its initial twenty-eight year term. See Copyright Amendments Act of 1992, Pub. L. 102-307, ch. 17, sec. 102, §304, 106 Stat. 264; 3 Nimmer & Nimmer, supra note 19, § 9.05; 1 REFF, supra note 98, at 26, 37 (listing the release dates for these four songs); see also Kahle v. Gonzalez, 487 F.3d 697, 700 (9th Cir. 2007) (rejecting a First Amendment challenge to the 1992 Act). For instance, assuming for argument’s sake that Johnson’s contribution to “Nadine” was published in 1964, its initial copyright term would have expired in 1992 and automatically renewed until 2059. 17 U.S.C. § 304 (2012).

Accordingly, as long as Johnson’s contributions were still eligible for copyright protection (i.e., if they had not fallen into the public domain) by 2000—and he appears to have had strong arguments on this point—Johnson could have validly applied for registrations on them before he sued. See 17 U.S.C. §§ 408, 411 (2012); Foote v. Franklin, 49 U.S.P.Q.2d 1523, 1526 n.3 (N.D. Tex. 1998).
door to a viable infringement claim against Berry, one which the statute of limitations likely would not have barred. 233 If he had prevailed under this theory, Johnson would in some sense have wielded more power over the songs than he could have as their joint author because Berry, going forward, would have had to obtain Johnson’s permission to use Johnson’s copyrighted contributions to the songs, as opposed to simply having to provide Johnson the joint author’s share of half of whatever Berry earned from the songs. 234

Such a scenario has the obvious potential to create huge problems for copyright law and copyright-reliant industries. By splintering works with multiple contributors (what we might call “multi-contributor works”) into several smaller copyrighted works (or “sub-works” as Rebecca Tushnet has called them), present law—or at least the courts’ present interpretation of the law—may give those who are not joint authors, but who have contributed independently copyrightable expression to larger works, the legal right to hold those works hostage, a right that joint authors lack. 235

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233. See supra note 54 and accompanying text (detailing courts’ more lenient treatment of copyright infringement claims under 17 U.S.C. § 507(b) (2012)). Under Garcia’s and Ulloa’s holdings, Johnson could perhaps have also made the alternate claim that he had an individual copyright in his piano performance on the sound recordings of the songs at issue. See Garcia, 766 F.3d at 933–36; see supra note 54 and accompanying text; see also supra note 111 and accompanying text. This claim could also have entailed bringing Chess Records or its successor entity into the suit. If he had succeeded on such a claim, Johnson could have blocked any further use of the recordings without his permission. I think most would agree that this situation, as well as the one in which Johnson could have held the songs hostage through an individual copyright in his contributions, are fairly bizarre, at least absent fraud, duress, undue influence, or lack of capacity. Fraud and capacity issues, in fact, were raised in Johnson’s case. See supra notes 53–60 and accompanying text. But assuming a level playing field, contributors who help create a larger work should, if they have substantially contributed to its essence, get credit as joint authors. The contributions that are not substantial, but which were still intended to form part of a larger work, should stay that way and not later splinter off from the work. I believe that the Berry-Johnson test, even without the accompanying compulsory license, would prevent much of this fragmentation. By opening the joint authorship door somewhat wider, more contributors will be recognized and rewarded, and there should be fewer “non-joint author but independently copyrightable expression-contributing” individuals left over to sue authors.

234. Compare Thomson, 147 F.3d at 199 (“[E]ach joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made.”) (citing 17 U.S.C. § 201(a) (2012)), with 17 U.S.C. § 106 (2012) (granting a solo author the sole and exclusive right to, among other things, “reproduce the copyrighted work in copies or phonorecords”). Johnson did originally include an infringement claim in his suit, but it was dismissed from the case early on as inconsistent with his joint authorship claim under the premise that a person asserting joint authorship cannot sue his fellow author for infringement. Johnson v. Berry, 171 F. Supp. 2d 985, 988–90 (E.D. Mo. 2001); see also supra note 10 and accompanying text. There is no indication that Johnson raised or that the court considered the alternative argument that he had a copyright in his individual contributions to the songs.

And this scenario is playing out now. In the recent, ongoing case of Garcia v. Google, the plaintiff, Garcia, has claimed that she owns the copyright in her acting performance in the controversial film Innocence of the Muslims. Garcia alleges that she did not know the true subject matter of the film when she participated in it, such that her participation in the film was fraudulently induced by the screenwriter and producer, Mark Basseley Youssef. She seeks to force Google to permanently keep the film off the Google-owned YouTube video website.

Garcia has already won a preliminary injunction, forcing Google to take the film down for at least the duration of the lawsuit. She did this by convincing two out of three judges from the Ninth Circuit that she is likely to prevail on her claim that she is the sole author of her individual acting performance in the film. At the start of its preliminary injunction ruling, the Ninth Circuit rejected any notion that Garcia was a joint author in the film or that Youssef was a joint author in Garcia’s acting performance on the grounds that Garcia did not regard herself as an author of the film and Youssef did not regard himself as an author of her performance. Thus if she wins the case Garcia could, under present law, permanently block any use of the film that incorporates her copyrighted performance.

Blocking this particular film’s use by Youssef—particularly if he did in fact fraudulently induce Garcia into acting in it—is not necessarily a bad result. But it is the import of the Ninth Circuit’s

is-guilty-of-judicial-activism-garcia-v-google.html; Rebecca Tushnet, My Long, Sad Garcia v. Google Post, REBECCA TUSHNET’S 43(B)LOG (Mar. 17, 2014), http://tushnet.blogspot.com/2014/03/my-long-sad-garcia-v-google-post.html.

236. See Garcia, 766 F.3d at 932–33. Innocence of the Muslims is the film that sparked protests around the world as well as controversy over the motivations for the attack on the US Embassy in Benghazi, Libya. See David D. Kirkpatrick, A Deadly Mix in Benghazi, N.Y. TIMES (Dec. 28, 2013), http://www.nytimes.com/projects/2013/benghazi/#/?chapt=0. Garcia alleges that she has received death threats as a result of her participation in the film. See Garcia, 766 F.3d at 932.

237. See Garcia, 766 F.3d at 932–33.

238. See id.; First Amended Complaint at 14–15, Garcia v. Nakoula, No. 12-cv-08315-MWF-VBK (C.D. Cal. Nov. 30, 2012). Garcia’s claim against Google is based in part on the Digital Millennium Copyright Act (DMCA), which provides procedures by which copyright owners can file takedown notices of copyrighted material posted by users on, for instance, a website like YouTube, essentially requiring the site owner to take down the material or be subject to liability via lawsuit. See 17 U.S.C. § 512 (2012); Garcia, 766 F.3d at 932–33.

239. See Garcia, 766 F.3d at 939-40.

240. See id. at 932–49.

241. See id. at 933.

242. See supra notes 230–31 and accompanying text.

243. But see Balasubraman, supra note 235 ("It’s certainly not very speech friendly to take an expansive view of copyright in connection with takedown requests that are prompted by
reasoning that could lead to significantly bad results in other cases. The ruling's critics have questioned the court's conception of what constitutes a copyrightable “work.” They argue that the film is the work and Garcia's performance is solely a part of that work, as opposed to constituting an independently copyrightable work itself. However, determining whether independently copyrightable expression is or is not a separately copyrightable work is often a difficult proposition.

In Johnson v. Berry, for example, I think we can argue either way whether the horn riff in "Nadine," which Johnnie Johnson claimed he created, was separable from the song and therefore a separately copyrightable work. On one hand, it may have little significance or value apart from the rest of the song. On the other hand, the riff can be played separately from the rest of the song, and it arguably clears the low bar set by the courts' broad definition of copyrightable expression, so it is not exactly clear why Johnson's contribution could not, by itself, be copyrighted. As we see, this issue, as the Ninth Circuit itself noted in Garcia, could create an impenetrable thicket of copyright in multi-contributor works.

The statutory provision I have proposed aims to clear this thicket by creating a default rule that authors have an irrevocable license to use the independently copyrightable contributions of their non-author collaborators. So even assuming that Garcia's acting performance or Johnson's "Nadine" riff constitute separately copyrightable works, the authors of the larger works in which they are incorporated will be able to use these sub-works as part of the larger whole for any lawful purpose unless the parties have otherwise agreed in writing or unless a court determines that (a) the non-author's contribution to the larger work was induced by fraud, duress, or undue influence or (b) the non-author lacked the mental capacity (or, threats of violence. What's next? Someone who issues a widely ridiculed religious pronouncement starts to issue DMCA takedown notices directed at articles critiquing and poking fun at the pronouncement?

244. See, e.g., Balasubraman, supra note 235; Tushnet, supra note 235.
245. See supra notes 85–88 and accompanying text.
246. See Luck's Music Library, Inc. v. Ashcroft, 321 F. Supp. 2d 107, 118 (D.D.C. 2004) (noting that originality, for purposes of copyrightability, "merely requires independent creation by the author and just a scintilla of creativity" (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991))). And the "Nadine" riff is certainly more separable than, for example, the contributions of two people working to come up with the exact same sentence to use in an article or in a lyric to a song where a given set of words, arrived at together, is indivisible.
247. See Garcia v. Google, Inc., 766 F.3d 929, 36 (9th Cir. 2014) ("[A]ny analysis of the rights that might attach to the numerous creative contributions that make up a film can quickly become entangled in an impenetrable thicket of copyright."). en banc reh'g granted, 771 F.3d 647 (9th Cir. 2014). This is true even if the Ninth Circuit reverses itself after reviewing its injunction ruling en banc, as other courts will still have to grapple with this issue going forward.
if a minor, legal capacity) to have negotiated a license for the use of his contribution.248

Thus, applying the Berry-Johnson test to Garcia, and assuming for the sake of argument that Garcia’s acting performance is in fact a separately copyrightable work, the court would first assess whether Garcia was, with Youssef, a joint author of (a) the film or (b) her acting performance in the film. It is fairly clear that under Berry-Johnson’s straightforward interpretation of the word “intention,” Garcia and Youssef intended to merge their contributions together into one work—the film *Innocence of the Muslims*—but given her relatively minor role in the film and the presumptive industry custom that actors are not usually considered joint authors of films, Garcia is unlikely to be determined a joint author of the film. Whether Youssef was a joint author of Garcia’s acting performance is a closer case, given Youssef and Garcia’s mutual intent to merge his script with her performance of it.249 If the court would find both Youssef and Garcia as having substantially contributed to the essence of Garcia’s acting performance and therefore that they are joint authors of her performance, the main problem posed by the case would disappear—Garcia would no longer, by herself, be able to force Google to remove *Innocence of the Muslims* from YouTube simply because she acted in the film.250

However, even if the court found otherwise—that Garcia’s acting performance was not a joint work, jointly authored by Garcia and Youssef, but instead a work solely authored by Garcia—the compulsory license provision I have proposed would grant Youssef an automatic and irrevocable license to use Garcia’s contribution in the film unless (a) she and Youssef agreed otherwise in writing or (b) she could prove Youssef fraudulently induced her to act in the film or that she did so under duress, undue influence, or at a time when she lacked legal capacity to have negotiated a license for the use of his contribution.

248. These exceptions to the compulsory license aim to address the fraud in *Garcia*, Mary LakeFrances’s concerns discussed infra note 252, and generally any situation in which a contributor’s participation in the work is not truly voluntary.

249. This is likely the case even if what Garcia alleges is true—that her dialogue in the film was partially overdubbed by Youssef with another voice—because her non-overdubbed performance, in which she claims authorship, apparently did use a script written by Youssef. See *Garcia*, 766 F.3d at 932–34.

250. Even as a joint author and copyright owner, Garcia would have the long-recognized right to pursue a fraud claim against Youssef. See, e.g., STAFF OF THE SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONGRESS, STUDIES ON COPYRIGHT LAW REVISION (Comm. Print 1960), available at http://copyright.gov/history/studies/study12.pdf. But it would distance third-parties like Google from the fight—i.e., Youssef would be responsible for damages to Garcia caused by the film, but she would likely be unable to force Google to take it down from YouTube if Google’s use was authorized by Youssef—a potentially beneficial result from a First Amendment perspective. See supra note 243 and accompanying text.
the legal capacity to have negotiated a license for the use of her contribution. So again the problem is solved—Garcia cannot, solely based on the fact that she acted in the film, dictate its use—while still allowing Garcia on the grounds of fraud to seek revocation or termination of Youssef’s license to use her performance in the film.

Accordingly, where the Berry-Johnson test would improve substantial contributors’ access to joint authorship, the accompanying compulsory license provision would close an increasingly worrisome loophole in copyright law that may give relatively minor contributors greater control over works than joint authors.

Last, what about insubstantial, non-independently copyrightable contributions under the Berry-Johnson test? They would simply be unprotected by copyright law. As discussed above, we must draw the line somewhere so we can prevent copyright’s unwarranted expansion to the most minor of contributions, like the trivial idea offered by a dinner party guest or the author’s friend who suggests that a sentence be changed in a book’s preface.

I believe that the Berry-Johnson test and its accompanying compulsory license provision can improve where we draw this line, sorting out substantial from insubstantial, author from non-author. But regardless of whether the courts or Congress officially adopt it, I hope the test will honor its namesake by adding to the healthy ongoing joint authorship debate, causing us to reexamine how we determine authorship in creative works.

VI. CONCLUSION

Ian Stewart, quoted above, once told Keith Richards, “Don’t forget that Johnnie Johnson is alive and well and still playing in St.

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251. Garcia and Youssef apparently did have a separate written agreement, but Garcia claims her signature on it was forged. See Garcia, 766 F.3d at 936 n.5. It is inherent in the proposed compulsory license provision that a written agreement must be valid in order to remove a given situation from the ambit of the compulsory license.

252. Mary LaFrance has expressed concern that, without an individual copyright in their individual contributions, non-dominant authors will be even less protected by the law than they already are. See LaFrance, supra note 42, at 244 n.217. I share the spirit of her concern but think that if the Berry-Johnson test or a similar expansion of joint authorship doctrine is implemented, non-dominant authors will obtain greater protection via an improved opportunity to obtain the benefits of joint authorship. After joint authorship’s expansion, the individual interests of the remaining contributors—whose contributions are deemed not to have substantially impacted the essence of a work—would in my view be outweighed by the systemic problems posed by the splintering of multi-contributor works into independently copyrighted subworks.

253. See 1 NIMMER & NIMMER, supra note 19, § 2.01 (“It has been said that all legal questions are in the last analysis questions of degree, requiring judicial line drawing. Certainly, copyright law is replete with such questions.”); supra notes 226–28 and accompanying text.
Louis,” setting in motion a chain of events that led to Johnson’s public rediscovery, the resurrection of his career, and his eventual lawsuit against Chuck Berry. Sadly, Johnson, who passed away in 2005, is no longer alive and playing in St. Louis. But Berry is. He still sings and plays his guitar at the Blueberry Hill restaurant and music club across the river from where he and Johnson began their musical journey on the last night of 1952. Berry performs much of what he and Johnson originally recorded together, cultural touchstones like “Roll Over Beethoven,” “Brown Eyed Handsome Man,” “School Day,” “Sweet Little Sixteen,” and “Rock and Roll Music.”

Because he sought recognition too late, Johnson lost his bid to gain credit for helping create these classics and to recover half of the riches they’ve generated for Berry. But Johnson’s joint authorship claim can still be worth something to us, particularly if we learn from his and Berry’s invaluable testimony and take to heart its central lesson: great artists rarely, if ever, become great alone.

In what is perhaps the definitive piece on Chuck Berry, music critic Robert Christgau observed that “the greatest thing about art is the way it happens between people.” Christgau was speaking of the interaction between artist and audience, or among audience members themselves, but given the revelations in Johnson v. Berry, we may understand this to apply as well to art that springs from collaboration. Some, like Berry and Justice Story, suggest that all art so springs, whether from an external process with a collaborator or an internal one where the artist remolds his myriad influences into a new vision. With respect to joint authorship and in copyright as a whole, rather than run from this idea, we would do well to embrace it.


256. Christgau, supra note 7, at 66.